No. 17-1705	
Title:	PDR Network, LLC, et al., Petitioners v. Carlton & Harris Chiropractic, Inc.
Docketed:	June 26, 2018
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Numbers:	(16-2185)
Decision Date:	February 23, 2018
Rehearing Denied:	March 23, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 21 2018	Petition for a writ of certiorari filed. (Response due July 26, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Jul 11 2018	Waiver of right of respondent Carlton & Harris Chiropractic, Inc. to respond filed. **Main Document**
Jul 18 2018	DISTRIBUTED for Conference of 9/24/2018.
Aug 01 2018	Response Requested. (Due August 31, 2018)
Aug 29 2018	Brief of respondent Carlton & Harris Chiropractic, Inc. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Reply of petitioners PDR Network, LLC, et al. filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Sep 12 2018	DISTRIBUTED for Conference of 10/5/2018.
Oct 09 2018	DISTRIBUTED for Conference of 10/12/2018.
Oct 22 2018	DISTRIBUTED for Conference of 10/26/2018.
Oct 29 2018	DISTRIBUTED for Conference of 11/2/2018.
Nov 05 2018	DISTRIBUTED for Conference of 11/9/2018.

Nov 13 2018	Petition GRANTED limited to the following question: Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.
Nov 27 2018	Motion for an extension of time to file the joint appendix and petitioner's brief on the merits filed. **Main Document** **Proof of Service**
Nov 28 2018	Motion to extend the time to file the joint appendix and petitioner's brief on the merits granted and the time is extended to and including January 8, 2019.
Jan 08 2019	Brief of petitioners PDR Network, LLC, et al. filed. **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Jan 09 2019	Motion to dispense with printing the joint appendix filed by petitioners PDR Network, LLC, et al. **Main Document** **Proof of Service**
Jan 15 2019	Brief amicus curiae of Aditya Bamzai filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2019	Brief amici curiae of State and Local Government Associations filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2019	Brief amici curiae of State of Oklahoma, et al. filed. **Main Document** **Certificate of Word Count** **Certificate of Word Count**
Jan 15 2019	Brief amicus curiae of U.S. Chamber of Commerce in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 22 2019	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 25 2019	SET FOR ARGUMENT on Monday, March 25, 2019
Feb 07 2019	Brief of respondent Carlton & Harris Chiropractic, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 14 2019	CIRCULATED
Feb 14 2019	Brief amicus curiae of United States filed. (Distributed) **Proof of Service** **Main Document**

Feb 14 2019	Brief amicus curiae of Electronic Privacy Information Center filed. (Distributed) **Main Document** **Proof of Service**
Feb 14 2019	Brief amici curiae of American Bankers Association, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 14 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Feb 15 2019	Corrected Certificate of Compliance from the Electronic Privacy Information Center filed. (2/19/2019) **Main Document**
Feb 21 2019	Record requested from the U.S.C.A. 4th Circuit.
Mar 04 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 11 2019	Reply of petitioners PDR Network, LLC, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 25 2019	Argued. For petitioners: Carter G. Phillips, Washington, D. C. For respondent: Glenn L. Hara, Rolling Meadows, Ill.; and Rachel P. Kovner, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

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No. _____

In The Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a challenge to the jurisdiction of every court in the nation to interpret and apply the law. A critical question, and circuit split, persists concerning the interplay between the Hobbs Act, also known as the Administrative Orders Review Act, 28 U.S.C. § 2342, and this Court's seminal decision in *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). This Court's review is needed to clarify the jurisdiction of all courts to decide the proper level of deference afforded to interpretive agency guidance. If allowed to stand, the Fourth Circuit's jurisdiction-stripping ruling would elevate those agencies identified in the Hobbs Act above even the judiciary; empowering agency orders to trump the courts' fundamental "province and duty" to interpret the law.

In enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress permitted civil liability only for sending "unsolicited advertisements" by fax. 47 U.S.C. § 227(b)(1)(C). In 2006, the Federal Communications Commission ("FCC"), tasked with implementing the TCPA, promulgated a Final Rule with respect to those faxes that "promote goods and services even at no cost."

Under *Chevron*, courts are empowered to independently assess whether a statutory term is "unambiguous," and thus, ripe for judicial interpretation. If a term is deemed ambiguous, courts still retain their discretion to defer to agency guidance. But courts owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, they find themselves unable to discern Congress's meaning.

Applying a traditional *Chevron* analysis, the District Court for the Southern District of West Virginia held the term "advertisement" in the TCPA was unambiguous; thus, it need not automatically defer to the FCC's guidance in deciding whether to grant Defendant/Petitioner's motion to dismiss. The District Court nevertheless "harmonized" the FCC's interpretive guidance with its own reading of the TCPA, and held the single fax at issue could not be read to "promote" anything other than information. In a split decision, the Fourth Circuit vacated and remanded, holding instead that the Hobbs Act "precluded" the District Court from engaging in a *Chevron* analysis, and that the District Court was required to automatically defer to the FCC's guidance on what qualifies as an "advertisement" under the TCPA.

Congress passed the Hobbs Act to provide a mechanism for judicial review of certain agency orders. To ensure the Hobbs Act did not impugn on the "province and duty" of the judiciary, the statute was intended to bar only facial challenges to the "validity" of an agency's order—not judicial review of the applicability of an agency order with respect to a particular set of facts and circumstances. As observed by the Sixth and Ninth Circuits in this precise context, a deepening circuit split exists as to whether courts must automatically defer to, and broadly apply, the FCC's definition of an "advertisement" in the absence of such ambiguity.

Ignoring cannons of statutory interpretation, the Fourth Circuit also held the FCC's guidance created a *per se* rule that faxes that promote goods and services "even at no cost" constitute "advertisements"—despite the lack of any

commercial nexus to a firm's business. This ruling created a circuit split with the Second, Sixth, Ninth and Eleventh Circuits, all of which require such a nexus, as well as a separate split with the Second Circuit, which held the FCC imposed only a rebuttable presumption that a fax promoting free goods and services qualifies as an "advertisement."

Thus, the questions presented are:

1. Does the Hobbs Act strip courts of jurisdiction to engage in a traditional *Chevron* analysis and require automatic deference to an agency's order even if there has been no challenge to the "validity" of such order?

2. Must faxes that "promote goods and services even at no cost" have a commercial nexus to a firm's business to qualify as an "advertisement" under the TCPA, or does a plain reading of the FCC's 2006 order create a *per se* rule that such faxes are automatically "advertisements"?

PARTIES TO THE PROCEEDINGS

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC. Each Petitioner belongs to a corporate family of entities dedicated to delivering health knowledge products and services that support drug prescribing decisions and patient adherence to medication regimes to improve health.

Respondent is a chiropractic medical office located in West Virginia that delivers healthcare services.

RULE 29.6 STATEMENT

Petitioners PDR Network, LLC, and PDR Distribution, LLC, are wholly-owned subsidiaries of PDR, LLC. No other person or publicly held corporation owns 10% or more of the stock of PDR Network, LLC and PDR Distribution, LLC.

Petitioner PDR Equity, LLC is a wholly-owned subsidiary of PSKW Holdings, LLC. No other person or publicly held corporation owns 10% or more of the stock of PDR Equity, LLC.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, App. 1-31a, is reported at 883 F.3d 459. The Order and judgment of the District Court granting PDR's motion to dismiss, *id.* at 32-43a, is unreported, but available at 2016 U.S. Dist. LEXIS 135310.

JURISDICTION

The final Order of the Court of Appeals was entered on February 23, 2018. App. 1a. A timely petition for rehearing *en banc* was denied on March 23, 2018. *Id.* at 45a. The mandate issued on April 2, 2018. *Id.* at 46a. PDR filed this Petition for a Writ of Certiorari on June 21, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the TCPA, as amended by the Junk Fax Prevention Act of 2005 ("JFPA"), 47 U.S.C. § 227, are reprinted in the Appendix at App. 47-48a. Also reprinted are pertinent provisions of the FCC's May 3, 2006, Final Rule, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 FR 25967 (May 3,

2006) ("2006 FCC Rule"), *id.* at 49a, and the Administrative Orders Review Act, 28 U.S.C. § 2342(1) ("Hobbs Act"). *Id.* at 50a.

INTRODUCTION

This case presents an opportunity for this high Court to decide the fundamental jurisdiction of all lower courts to independently "say what the law is" when faced with interpretative agency guidance. The Fourth Circuit's holding that the Hobbs Act "precluded" the District Court from conducting a "traditional" *Chevron* analysis curbs the jurisdiction of all courts everywhere to apply the law in private actions. At the same time, the Fourth Circuit's ruling also serves to unjustifiably bolster the power of all orders from agencies identified in the Hobbs Act, 28 U.S.C. § 2342(1)-(7)—effectively allowing such guidance to eclipse even the operative statutes.

As the dissent by Circuit Judge Stephanie D. Thacker makes clear, the Hobbs Act—which provides a mechanism for judicial review of certain administrative orders—is implicated only if there is a challenge to the "validity" of an agency's order. There was no such challenge here. Rather, the District Court "presumed" the FCC's guidance was "valid," and indeed, held the 2006 FCC Rule perfectly harmonized with its interpretation of the TCPA. Because the "validity" of the FCC's guidance was never challenged, the District Court retained its jurisdiction to properly conduct a *Chevron* analysis.

The question of whether the Hobbs Act precludes a *Chevron* analysis has reached a boiling point, as conflicting circuit court decisions pile up across the country. This case presents an ideal vehicle for this

Court to decide this issue, along with equally important issues concerning the scope of the TCPA.

In the decision below, a divided panel of the Fourth Circuit held the District Court lacked the jurisdiction to independently interpret the statutory term "advertisement" and apply it to the single fax in question. That decision contravenes basic judicial providence to say what the law is, directly conflicts with decisions of other circuits, and warrants this Court's review.

The Fourth Circuit's decision also raises two additional questions that merit this Court's review. Indeed, not only did the Fourth Circuit unjustifiably strip the District Court of jurisdiction, it also held that under the 2006 FCC Rule faxes promoting goods or services at no cost: (i) need not have a "commercial aim"; and (ii) are *per se* "advertisements." The Fourth Circuit's rulings rest on the inexplicable and unsupported proposition that a single line of the 2006 FCC Rule could be separated from the remaining text in the same paragraph to create a broad, "prophylactic" rule. This reading ignored the FCC's own comment that an "advertisement" must involve products that are often commercially available for sale. The Fourth Circuit's categorical broadening and draconian interpretation of the 2006 FCC Rule independently warrants this Court's review.

This case underscores the need for this Court to resolve these issues. It involves a nationwide TCPA class action against a company that has been publishing and delivering FDA-mandated drug labeling and prescribing information to healthcare providers for over 70 years. Such publications—including the *Physicians' Desk Reference*®—ensure

providers are aware of critical side effects, potential drug interactions, black box warnings and other key considerations before prescribing medications to their patients. PDR neither manufacturers, sells, nor promotes any of the pharmaceutical drugs listed in the *Physicians' Desk Reference*©.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

In 1991, Congress enacted the TCPA, which prohibits the sending of "unsolicited advertisements" via fax. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3, 105 Stat. 2394, 2395, *codified at* 47 U.S.C. § 227(b). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." *Id.* § 227(a)(5). The TCPA also created a private right of action for claims "based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection." *Id.* § 227(b)(3). This private cause of action permits the recipient of an unsolicited fax advertisement to seek damages from the sender and recover actual monetary loss or $500 in statutory damages for each violation. *Id.* If a court finds the sender "willfully or knowingly violated" the TCPA, damages may be trebled. *Id.*

In 2005, Congress enacted the JFPA, which, among other things, modified the definition of "unsolicited advertisement" to state that prior express permission may be obtained "in writing or

otherwise." *See* Junk Fax Prevention Act of 2005, Pub. L. No. 10921, § 2(g), 119 Stat 359 (codified at 47 U.S.C. § 227(a)(5)). But it did not otherwise expand on the statutory term "advertisement."

Like the TCPA, the JFPA directs the FCC to "implement" the statute. *Id.* § 2(h). In 2006, the FCC issued a Final Order interpreting the JFPA with respect to "Offers for Free Goods and Services and Informational Messages," which explained:

> [F]acsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, 'free' seminars serve as a pretext to advertise commercial products and services. Similarly, 'free' publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile [sic] recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the 'quality of any property, goods, or services.' Therefore, facsimile communications regarding such free goods and services, if not purely 'transactional,' would require the sender to obtain the recipient's permission beforehand, in the absence of an [Established Business Relationship].
>
> By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates,

> or employee benefit information, would not be prohibited by the TCPA rules.

App. 49a.

The Hobbs Act, also known as the Administrative Orders Review Act, provides a mechanism for judicial review of certain administrative orders, including "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).[1] A party aggrieved by any order of an agency may challenge the order by filing a petition in the court of appeals for the judicial circuit where the petitioner resides or has its principal office, or in the Court of Appeals for the D.C. Circuit. *Id.* § 2343. The Hobbs Act specifically vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the orders to which it applies, including FCC interpretations of the TCPA. *Id.* § 2342. "This procedural path created by the command of Congress promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency" charged with overseeing the TCPA. App. 7a (citing *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014)).

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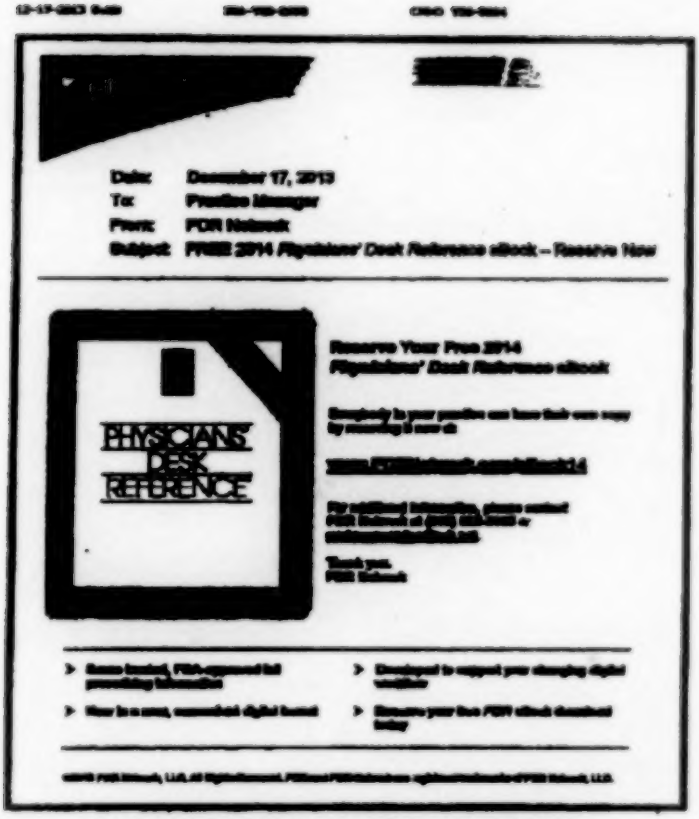
[1] This also includes orders of the Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Atomic Energy Commission and others. *Id.* § 2342(1)-(7)

B. Carlton & Harris's Lawsuit

The actions giving rise to this case are largely undisputed. Respondent Carlton & Harris maintains a chiropractic office in West Virginia. App. 3a. Petitioner PDR is a company that "delivers health knowledge products and services" to healthcare providers. *Id.* Among other things, PDR publishes the *Physicians' Desk Reference®*, a widely-used compendium of prescribing information for various prescription drugs. *Id.* PDR receives fees from pharmaceutical manufacturers for including their drugs in the *Physicians' Desk Reference®*. *Id.* at 3a. Critically, it is undisputed that the *Physicians' Desk Reference®* is "an informational resource which is free to recipients," and that PDR "does not sell the reference [guide] or sell anything in the reference." *Id.* at 35a. The drugs identified in the reference guide are sold by their respective manufacturers, who are third-parties unaffiliated with PDR. *Id.*

On December 17, 2013, PDR sent Carlton & Harris a single fax (the "Fax"). *Id.* at 3a. A copy of this Fax has been reproduced below:



Id. at 51a.

The Fax was addressed to "Practice Manager" and its subject line announced: "FREE 2014 *Physicians' Desk Reference* eBook — Reserve Now." *Id.* at 3a. The Fax invited the recipient to "Reserve [a] Free 2014 *Physicians' Desk Reference* eBook" by visiting PDR's website. *Id.* It included a contact email address and phone number. *Id.* The Fax described various benefits of the e-book, noting that it contained the "[s]ame trusted, FDA-approved full prescribing information . . . [n]ow in a new, convenient digital format" and was "[d]eveloped to

support [the recipient's] changing digital workflow." *Id.* at 3-4a. At the bottom, a disclaimer provided a phone number the recipient could call to "opt-out" of receiving future communications via fax. *Id.* at 4a.

Carlton & Harris sued PDR in the United States District Court for the Southern District of West Virginia, asserting a claim under the TCPA for the single fax in question. *Id.* Carlton & Harris seeks to represent a class of similarly situated recipients of faxes offering free copies of the *Physicians' Desk Reference*© e-book. *Id.*

C. PDR's Motion to Dismiss and District Court Proceedings

PDR moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. *Id.* It argued that the Fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for sale to the recipient. *Id.* In response, Carlton & Harris pointed to a 2006 FCC Rule interpreting the term "unsolicited advertisement." *Id.* at 5a. Carlton & Harris argued that the Fax it received was an unsolicited advertisement as defined in the 2006 FCC Rule because it promoted a good at no cost. *Id.* Moreover, Carlton & Harris argued that the District Court was obligated to follow the 2006 FCC Rule pursuant to the Hobbs Act. *Id.*

The District Court (Chambers, C.J.) disagreed. *Id.* The District Court held the Hobbs Act did not compel it to defer to "the FCC's interpretation of an unambiguous statute." *Id.* at 5a, 39a. The District Court found the TCPA's own definition of "unsolicited advertisement" "clear and easy to apply," and thus, held it was not required to follow

the 2006 FCC Rule and "decline[d] to defer" to it. *Id.* at 5a, 40a (citing *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).[2] The District Court also opined that even under the 2006 FCC Rule, PDR's fax was still not an advertisement because the rule requires an advertisement have a "commercial aim," and no such aim existed here. *Id.* Accordingly, the District Court held Carlton & Harris had not stated a valid claim under the TCPA and granted PDR's motion to dismiss. *Id.* An appeal to the Fourth Circuit followed.

D. The Fourth Circuit's Split Decision

On February 23, 2018, a divided panel of the Fourth Circuit (Diaz, J.) ruled that because "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," the District Court "erred by engaging in a *Chevron* analysis and 'declin[ing] to defer' to the FCC rule." *Id.* at 11a. The majority held it was of "no moment" whether the District Court "purported" to invalidate the 2006 FCC Rule, or whether PDR had sought to challenge the FCC's ruling. *Id.* at 10a.

The Fourth Circuit majority also held that the 2006 FCC Rule created a "*per se* rule" that a "fax offering a free good or service" constitutes an "advertisement" under the TCPA—regardless of the

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[2] The District Court performed a traditional two-step *Chevron* analysis. At step one, the court determines whether the statute is ambiguous. 467 U.S. at 842-43. If the statute is clear, "that is the end of the matter" and the court does not defer to the agency construction. *Id.* at 842. If the statute is ambiguous, the court moves to step two. *Id.* at 843. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*; App. 40a.

presence of a commercial aim or the purpose and product at issue. *Id.* at 16a, 18a. The majority based its interpretation upon the "first sentence of the relevant portion [of the Rule] . . . [s]etting aside the list of examples [that followed]." *Id.* at 13a.

Notably, the panel's ruling was fractured; it included a poignant dissent from Judge Thacker who opined that: "(1) the [D]istrict [C]ourt did not exceed its jurisdiction under the Hobbs Act; and (2) the 2006 FCC Rule requires a commercial aim, which is not present here[.]" *Id.* at 19a. The dissent concluded the Hobbs Act did not apply because "there [was] no facial challenge to the 2006 FCC Rule," and the District Court had properly "assumed the [Rule] was valid and harmonized the rule with its conclusions about the TCPA." *Id.* at 24a. The dissent also found that by divorcing a single line from the 2006 FCC Rule to create a "prophylactic rule," the majority had failed to appreciate how the remaining language of the FCC Rule "informed" the FCC's guidance. *Id.* at 28-29a. On this point, Judge Thacker concluded that "[r]eading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA." *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

Congress passed the Hobbs Act to prevent disjointed attacks on agency orders via a challenge to the order's "validity." The practical consequence of the Fourth Circuit's decision in this case, however, is to unjustifiably expand the Hobbs Act to strip all courts of jurisdiction to apply federal statutes and interpret agency guidance. In so ruling, the Fourth

Circuit deepened a split of authority among circuit courts as to the reach of the Hobbs Act, as well as the appropriateness of engaging in a *Chevron* analysis to decide issues of statutory interpretation.

Certiorari is warranted to resolve the jurisdictional issues presented, as well as equally-important questions concerning the TCPA's scope raised by the Fourth Circuit's rulings on the law.

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTION

As Chief Justice Marshall has stressed, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed 60 (1803); *DaimlerChrsyler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("[n]o principle is more fundamental to the judiciary's proper role in our system of government" than a court's jurisdiction) (citation omitted). Ignoring this bedrock principle, the Fourth Circuit held the Hobbs Act "precluded" the District Court from exercising its well-established jurisdiction under *Chevron* to decide whether the statutory term "advertisement" was unambiguous—instead requiring the lower court to simply defer to, and broadly apply, the FCC's guidance.

As this Court has observed, "[f]ederal courts, though 'courts of limited jurisdiction,' in the main 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376, 132 S. Ct. 740, 747 (2012) (citing *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Cohens* v. *Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 5

L. Ed. 257 (1821)). The District Court was thus acting within its power to conduct a *Chevron* analysis to decide the amount of deference the FCC's guidance deserved. Allowing the Fourth Circuit's jurisdiction-stripping ruling to stand would result in agency guidance subverting courts' "province and duty" to use their judgment to "say what the law is."

A. The Circuits Are Split On Whether A Court Must Automatically Defer To The FCC's Interpretation Of The Term "Advertisement" Under The Hobbs Act.

Since 1984, this Court has held that courts are not required to defer to an agency's interpretation of an unambiguous statute. *Chevron*, 467 U.S. at 843; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). This principle was reaffirmed earlier this year in *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (U.S. 2018) ("Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning.") (citation omitted) (Gorsuch, J.). And it is equally well-settled that "policy considerations cannot create an ambiguity when the words on the page are clear." *Id.* at 707 (citing *SEC* v. *Sloan*, 436 U.S. 103, 116-117 (1978)).

Yet, as the Sixth Circuit has expressly observed, there is a "circuit split" regarding "whether to defer to the [FCC's] explanation of its definition" of the term "advertisement." *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 223 (6th Cir. 2015) (*comparing N.B. Indus. v. Wells Fargo & Co.*, 465 F. App'x 640, 642-43 (9th Cir. 2012) (giving

Chevron deference to FCC's interpretation regarding incidental ads) *with Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 687-88 (7th Cir. 2013) (rejecting FCC's interpretation regarding incidental ads)). This known split requires clear guidance from this Court.

1. Likely because the Fourth Circuit found the District Court's interpretation of the TCPA at odds with the FCC's, the majority held the "jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and that by engaging in step one of *Chevron* and not "deferring" to the 2006 FCC Rule, the District Court tacitly "ignored" or "set aside" the FCC's guidance. App. 11a. But as the dissent noted, the Hobbs Act only limits challenges to an order's "validity," and there was no challenge here. *Id.* at 20-21a. Rather, the District Court "assumed" the rule was "valid" and did not conflict with the TCPA. *Id.* at 24a.

The Hobbs Act is not implicated here. The Hobbs Act's jurisdictional restriction is purposefully specific; while it prohibits a challenge to the process or methodology of an order's creation (*i.e.*, a "facial" attack), it does not prohibit a court from accepting an order as "valid" and "interpreting" whether an agency's ruling applies. *Osorio v. State Farm Bank, FSB*, 746 F.3d 1242, 1257 (11th Cir. 2014) ("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's . . . ruling is applicable to the present case."). The majority's assertion that "[w]hen *Chevron* meets Hobbs, consideration of the merits must yield to jurisdictional constraints," App. at 8a, misconstrues Congress's intent. This type of judicial activism has been previously disapproved. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017),

cert. denied, 138 S. Ct. 1043 (2018) (noting, in the context of a TCPA junk fax case, "[i]t is the Judiciary's job to respect the line drawn by Congress, not to redraw it as we might think best.").

As Judge Thacker observed, safeguards exist to alleviate the majority's concern over an "end-run" around the Hobbs Act—with its goal of "judicial efficiency." App. 11a. For example, the Fourth Circuit has held invalidation can occur at step one of *Chevron* if a court finds "the agency's construction is in conflict with the unambiguous statutory language." *Id.* at 20a (citation omitted). That did not happen here. Accordingly, the majority's reference to "[i]nvalidation by any other name," or courts "ignor[ing]" agency orders, is unfounded. *Id.* at 10-11a. When a court holds a statute is "unambiguous" under *Chevron*, and thus, that it need not give "substantial deference" to an agency's order, this is not the same as "invalidating" or "ignoring" the order. *Sandusky*, 788 F.3d at 223 ("[W]here our 'construction follows from the unambiguous terms of the statute'—as it does here—we do not defer to the agency's interpretation[.] In any event, reliance on the [FCC's] interpretation would only bolster our conclusion."); *IMHOFF Inv., LLC v. Alfoccino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (defendant questioned the "reasoning of the FCC's letter brief and its application to this case" without "directly challen[ging] the legitimacy of the FCC's definition of sender").[3]

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[3] District courts are in accordance with the Sixth Circuit. *See, e.g., Alpha Tech Pet, Inc. v. Lagasse, LLC*, 2016 U.S. Dist. LEXIS 120452, at *9 n.3 (N.D. Ill. Sep. 7, 2016) ("Contrary to Defendants' argument, this Court is not determining the validity of an FCC ruling by finding that the FCC ruling is not

The majority claimed "[e]very other circuit to consider the issue has reached the same result." App. 9a (citing *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013); *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App'x 444 (6th Cir. 2013); and *Mais*, 768 F.3d 1110). But as the dissent observed, these cases are "inapposite" or "distinguishable." *Id.* at 23-24a.

Nack and *Leyse* both involved a prohibited "facial challenge to an FCC regulation," which is not present here. *Id.* at 22-23a. In *Leyse*, the Sixth Circuit observed that "[a]s an initial matter, . . . resolving a TCPA claim like Leyse's does not *necessarily* implicate the Hobbs Act." 545 F. App'x at 447 (emphasis in original). Because Leyse argued the conduct at issue did not fit within the exemption for radio calls created by the FCC in 2003, the court would "only reach the question of Hobbs Act and its jurisdictional restrictions if [it] disagree[d] with

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binding, but is merely following the Seventh Circuit's decision that the particular FCC ruling at issue here is not binding with respect to interpreting the statutory and regulatory language relevant to this case."); *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, 2013 U.S. Dist. LEXIS 15952, at *9 (D.N.J. Feb. 6, 2013) ("while the Court does not find that the FCC's interpretations of the TCPA should be afforded substantial deference—because the statute is not facially ambiguous—those interpretations are clearly persuasive"); *P&S Printing LLC v. Tubelite, Inc.*, 2015 U.S. Dist. LEXIS 93060, at *8 (D. Conn. July 17, 2015) ("Because the statute is not ambiguous and defines the term 'unsolicited advertisement,' the FCC's interpretations are not controlling on this Court under *Chevron*"); *N.B. Indus. v. Wells Fargo & Co.*, 2010 U.S. Dist. LEXIS 126432, at *13-14 (N.D. Cal. Nov. 30, 2010) ("If the [TCPA's] definition of 'unsolicited advertisement' were ambiguous, the court would be inclined to give the [2006 FCC Rule] substantial deference under *Chevron*[.] In any event, the court considers and gives weight to the FCC's examples because they are persuasive and helpful.").

Leyse as to the scope of the FCC's rules." *Id.* at 448-449. Critically, the Sixth Circuit only applied the Hobbs Act because Leyse argued "the rule should be set aside because of procedural deficiencies in its promulgation." *Id.* at 458. The defendant in *CE Design, Ltd. v. Prism Bus. Media, Inc.*, also "asked the district court to ignore the FCC order" at issue, and argued the FCC-created defense "conflicts with the TCPA's plain language." 606 F.3d at 445, 447 (7th Cir. 2010). Lastly, as the dissent noted, *Mais* is "distinguishable" for the same reason. App. 24a.

Here, PDR did not ask the District Court to set aside or ignore the FCC rule; rather, as the dissent observed, "Appellant merely argued for a specific interpretation of the 2006 FCC Rule, and Appellee argued for a different interpretation." *Id.* The majority failed to appreciate this critical distinction.

2. The impact of this circuit split is undeniable. If this case had been filed in the Sixth Circuit, the result would have been markedly different. Under *Sandusky*, the Sixth Circuit would have conducted a *Chevron* analysis; held the statutory term "advertisement" was unambiguous, such that it need not "defer" to the 2006 FCC Rule; concluded an "advertisement" must "have profit as an aim"; and determined the instant Fax lacked such an aim. 788 F.3d at 223-24. This would have ended the case.[4] *Bais Yaakov*, 852 F.3d at 1082 ("The text of the [TCPA] provides a clear answer to the question presented in this case.") (citing *Chevron*, 467 U.S. at 842-43 & n.9); *SAS Inst.*, 138 S. Ct. at 1358 ("[A]fter applying traditional tools of interpretation here, we

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[4] As the dissent opined, dismissal was warranted in this case because Plaintiff was unable to satisfy even this "minimal burden" of alleging a "commercial aim." App. 30a.

are left with no uncertainty that could warrant deference. The statutory provisions before us deliver unmistakable commands."). Nor would the Sixth Circuit have "precluded" the District Court's ability to conduct a *Chevron* analysis under a misguided interpretation of the Hobbs Act's reach. *See also Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris*, DDS, PA, 781 F.3d 1245, 1256 (11th Cir. 2015) (applying *Chevron* deference to an FCC order interpreting the definition of the "sender" of a fax).

Likewise, if this case had been filed in the Second Circuit, the court would have disregarded the Hobbs Act argument altogether, as seen in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017),[5] and even before that in *Nigro v. Mercantile Adjustment Bureau, LLC*, 769 F.3d 804, 806 n.2 (2d Cir. 2014) ("Since neither party actually challenges the FCC's interpretation of the TCPA, we need not decide the extent to which the [Hobbs Act] limits our jurisdiction to review that interpretation.").

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[5] Notably, the majority was inconsistent regarding which circuit's authority it deemed "persuasive." The majority described *Sandusky* as not "persuasive" because it "made no mention of the Hobbs Act's jurisdictional bar nor explained how the court overcame it." App. 10a. Yet the majority also opined that the Second Circuit's decision in *Boehringer*, 847 F.3d 92—and, specifically, Judge Pierre Leval's concurring opinion—was "persuasive." *Id.* at 15a. But nowhere in *Boehringer* did the panel (or Judge Leval) discuss the "Hobbs Act's jurisdictional bar." In fact, as Judge Thacker pointed out, the plaintiff Physicians Healthsource similarly argued the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule," but the "Second Circuit did not address this argument and instead addressed the merits." *Id.* at 22a.

The result would have been the same in the Third Circuit. *Manuel v. NRA Grp. LLC*, 2018 U.S. App. LEXIS 816, at *4 n.5 (3d Cir. Jan. 12, 2018) ("Because we do not address the validity of the FCC's orders, we need not address Manuel's contention that the Hobbs Act restricts our jurisdiction[.]") (citation omitted); *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 373 n.2 (3d Cir. 2015) ("Because we reject Dominguez's claim that the FCC has interpreted the autodialer definition to read out the 'random or sequential number generator' requirement, we need not reach his argument regarding the Hobbs Act[.]").

At core, the majority conflates "deference" to an agency's order with its invalidation. But, as shown, courts can grant an agency's "common-sense interpretation" a level of "persuasive value" without deeming it "invalid." *Osorio*, 746 F.3d at 1256 (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 234 (2001) ("agency's interpretation may merit some deference whatever its form")). This is what the District Court did when it held that "even if it were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision." App. 40a. The District Court then "presumed" the 2006 FCC Rule was valid.[6] This had

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[6] The Ninth Circuit has repeatedly taken an identical approach to FCC rules and regulations in the context of the TCPA. *See, e.g., Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 792 n.2 (9th Cir. 2018) ("We presume the validity of the relevant FCC rules and regulations.") (citing *US W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) ("Properly promulgated FCC regulations currently in effect must be presumed valid" for purposes of a case not initiated under the Hobbs Act)); *CallerID4u, Inc. v. MCI Communs. Servs.*, 880 F.3d 1048, 1062 (9th Cir. 2018) ("Because this case was not initiated through . . . a petition

the effect of differentiating this case from the majority's "inapposite" or "distinguishable" cases—in that the District Court "harmonized" the agency's order with its interpretation of the TCPA. App. 24a.

Stripped of their jurisdiction, district courts will be expected to simply apply, out of context, *any* agency order identified in the Hobbs Act—regardless of whether the underlying statute is "unambiguous," and thus ripe for independent judicial interpretation. This undercuts the purpose of our judicial system. *Marbury*, 5 U.S. at 178, 1 Cranch 137, 2 L.Ed 60.

If left to stand, the majority's ruling as to the interplay between the Hobbs Act and *Chevron* will create irreconcilable inter-circuit conflicts, further exacerbating the confusion about when, and how, courts must apply *Chevron*. This is exactly the type of issue necessitating this Courts' review. *Wheaton College v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (resolving a circuit split is a "traditional ground for certiorari"); *Mims*, 565 U.S. at 376, 132 S. Ct. at 747 (granting certiorari "to resolve a split among the Circuits as to whether Congress granted state courts exclusive jurisdiction over private actions brought under the TCPA."); *see also* S. Ct. Rule 10(a).

II. CERTIORARI IS WARRANTED ON THE QUESTION OF THE APPLICATION OF THE FCC'S DEFINITION OF AN "ADVERTISEMENT"

The Fourth Circuit majority's ruling on the merits in this case is a direct outgrowth of its

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[under the Hobbs Act], we must presume the validity of FCC regulations, rules, and orders that are currently in effect.") (citing *Pac. Bell Tel. Co. v. Cal. PUC*, 621 F.3d 836, 843 n.10 (9th Cir. 2010)).

fundamentally flawed conclusion that the Hobbs Act stripped the District Court of jurisdiction to decide the level of deference afforded the 2006 FCC Rule. In so ruling, the Fourth Circuit further misjudged the impact and reach of the 2006 FCC Rule.

A. The Fourth Circuit's Holding That A Fax Promoting A Free Good Or Service Does Not Require A Commercial Aim Conflicts With Decisions Of The Second, Sixth, Ninth and Eleventh Circuits.

The majority held the FCC's order created a rule that "all faxes offering free goods and services" are "advertisements" under the TCPA. App. 16a. Judge Thacker disagreed, expressly holding instead that "the 2006 FCC Rule requires a commercial aim, which is not present here." *Id.* at 19a. Critically, the majority's holding conflicts with authoritative decisions from no less than four other circuits.

The majority heavily relied on Judge Leval's concurrence in *Boehringer* to support its assertion that the 2006 FCC Rule "requir[es] no commercial nexus at all." *Id.* at 14-15a. But the majority opinion of the Second Circuit in *Boehringer refused* to erase this "commercial nexus" requirement from the 2006 FCC Rule, observing: "Of course, as other courts have ruled, not every unsolicited fax promoting a free seminar satisfies the Rule. There must be a commercial nexus to a firm's business, *i.e.*, its property, products, or services[.]" 847 F.3d at 96; *see also id.* at 93 ("[W]e agree that a fax must have a commercial purpose."). *Boehringer* likewise held the 2006 FCC Rule "comports with the statutory language, which defines offending advertisements as those promoting 'the commercial availability or

quality of [the firm's] property goods or services.'" *Id.* at 95 (citing 47 U.S.C. § 227(a)(5)).

The Sixth Circuit similarly emphasized the need for a "commercial nexus" when it held "[t]he term 'advertisement' unambiguously contains commercial components: *To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim.*" *Sandusky*, 788 F.3d at 223-24 (emphasis added). The Ninth Circuit further held that because an item discussed in a fax was not "available to be bought or sold" or "for sale," it was not "commercially available," and thus, not an "advertisement" under the TCPA. *N.B. Indus.*, 465 F. App'x at 642. And lastly, the Eleventh Circuit held "[t]o fall within the [TCPA]," a fax must "draw[] attention to the 'commercial availability or quality' of [defendant's] products to promote their sale." *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366-67 (11th Cir. June 5, 2017). Based squarely on the law as understood by these four circuits, the District Court correctly upheld the "commercial aim" requirement for faxes promoting a "free" offering to be an "advertisement," and in the absence of such a finding, properly granted PDR's motion to dismiss. App. 42 (holding that a "plain reading" of the TCPA and the 2006 FCC Rule demonstrate that "they intend to curtail the transmission of faxes with a commercial aim.").[7]

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[7] *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152, 1163 (N.D. Ill. 2009) ("While Congress's clear intent was to prohibit unsolicited advertising, it is equally clear that Congress intended non-commercial messages to fall outside the ban."); *see also Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 182 (E.D. Pa. 1994) ("Congress clearly did not prohibit fax transmissions of all unsolicited information or

Conversely, the Fourth Circuit sought to erase any "commercial nexus" requirement, and thus, its decision conflicts with these authoritative decisions necessitating review and resolution by this Court.

B. The Fourth Circuit's Holding That Faxes Promoting Free Goods And Services Are *Per Se* "Advertisements" Conflicts With A Decision Of The Second Circuit.

The majority's conclusion that the 2006 FCC Rule created a "*per se* rule" that a fax promoting a free good or service is an "advertisement," App. 16a, separately conflicts with the Second Circuit's *Boehringer* decision—which held the 2006 FCC Rule supported, at best, only a rebuttable "presumption."

In *Boehringer*, the plaintiff argued the FCC's order treated an offer of a free seminar as a *per se* advertisement of "the commercial availability" of a product. 847 F.3d at 95. The Second Circuit rejected this argument. *Id.* Instead, it reasoned the fax would constitute an "advertisement" *only if* the free seminar offer was a pretext or prelude for a commercial promotion or sale offer. *Id.* at 98. The court then held the defendant "'can rebut such an inference [of intent to promote a commercial product] by showing [after discovery] it did not or would not advertise its products or services at the seminar.'" *Id.* at 98-99. By erroneously converting this

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communications, and there is some question whether it could do so constitutionally. . . . No matter how sympathetic plaintiff's case may be, the court may not rewrite the [TCPA] to enjoin or penalize behavior not prohibited by Congress.").

"presumption" into a "*per se* rule," the majority's ruling directly conflicts with *Boehringer*.[8]

On remand, the district court similarly rejected plaintiff's "*per se*" theory of liability. *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 2018 U.S. Dist. LEXIS 64844, at *26 (D. Conn. Apr. 18, 2018). Rather, Boehringer was given the opportunity to—and did—"rebut" the presumption that its fax discussing a free seminar was an advertisement with "evidence it did not feature its products or services at the seminar." *Id.*

The district court in *Boehringer* further held that "Physicians Healthsource's interpretation of an 'advertisement' sweeps far beyond the scope of the TCPA" in that it "would force any faxes with a general business purpose—in the case of a for-profit entity, virtually all of them—into the prohibited category of advertising. Nothing in the TCPA suggests that Congress intended the statute's proscription to be so broad." *Id.* at *24. This too is exactly what the District Court held here. App. 42a.

Here, the Fourth Circuit's majority and dissent agree: the "interpretation of regulations begins with their text." App. 11a, 25a. But diverge over *how* the 2006 FCC Rule should be interpreted. Judge Thacker's dissent elucidates how the majority's

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[8] The remaining "context" of this section of the 2006 FCC Rule further supports the need for a "commercial aim." For example, *Boehringer* observed how "[i]n a different but relevant context, the [2006 FCC Rule] states that 'a trade organization's newsletter sent via facsimile would not constitute an unsolicited advertisement, so long as [its] primary purpose is informational, rather than to promote commercial products.'" 847 F.3d at 96 (citing 2006 FCC Rule at 25973). This is exactly what the District Court held. App. 41a ("The fax here cannot be read to 'promote' anything other than information.").

overly-broad, "prophylactic" construction misconstrues the order's "plain reading":

> A plain reading of the 2006 FCC Rule demonstrates that its objective is to prevent faxes with a commercial aim. Its objective is not to prevent faxes that promote free goods or services per se[.]
>
> In order to reach its conclusion, the majority reads the first sentence of the 2006 FCC Rule—'[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition.'—in isolation. To be sure, if read in a vacuum, the first sentence seems to create a prophylactic rule. However, it is informed by the language that follows.
>
> Specifically, the second sentence of the 2006 FCC Rule redefines the subject faxes as those promoting free offerings with a commercial aim. It states, 'In many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services.' The 2006 FCC Rule then refers to 'such messages'—redefined as those with a commercial aim—and explains, '[I]t is reasonable to presume that such messages describe the 'quality of any property, goods, or services.' Reading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA.
>
> This is a 'permissible' construction[.]

Id. at 28-29a (citations omitted) To reach this conclusion, Judge Thacker (and the District Court) considered the text of the TCPA and the 2006 FCC Rule; common definitions of relevant terms[9]; and the context of the full passage. *Id.* at 26a, 40-42a.[10]

Conversely, the majority read the first sentence of the 2006 FCC Rule "in isolation," and failed to appreciate how the "language that followed" "informed" this initial proclamation. *Id.* at 28-29a. In so doing, the Fourth Circuit's judgment ignored fundamental canons of statutory construction, including that: (1) "words of a statute must be read in their context and with a view to their place in the overall statutory scheme"; (2) statutory terms may be read in light of the purpose of the statute; and (3) courts must "give effect . . . to every clause and word of a statute." *Osorio*, 746 F.3d at 1258; *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009). These same canons apply when interpreting regulations. *See, e.g., Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012).

Without considering *any* specific statutory or regulatory term, the majority held the "first sentence" of the 2006 FCC Rule was "clear and unambiguous." App. 13a. Accordingly, the majority intuited the FCC "declined to require" a "fact-based inquiry" regarding whether a fax promoting a free offering was an "advertisement." *Id.* at 17a. But as

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[9] This included: "promote"; "advertise"; and "commercial." App. 26a, 40-41a.

[10] Although Judge Thacker held the definition of an "advertisement" was "ambiguous," App. 26a, and the District Court held it was "unambiguous," *id.* at 39a, the end result is the same. Under either approach, the District Court was free to—and did—consider the FCC's guidance. *Id.* at 40-41a.

Boehringer observed, a "fact-based inquiry" was essential to allow a defendant to rebut any inference that a fax promoting a free offering "relate[d] to the firm's products or services," and thus, had a "commercial purpose." 847 F.3d at 95.

Based on the FCC's stated rationale for its characterization of faxes that "promote" free goods and services, it was clear to the District Court that "the evil to be combatted are faxes that are either overtly commercial in nature, meaning they directly offer something for sale, or are a pretext for a commercial transaction that will inevitably follow from the fax." App. 41a. In fact, "[t]o read the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly"—as Carlton & Harris proposed—would "obviate[] the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA." *Id.* at 42a.

To the extent the majority felt it was improving upon the TCPA by fashioning a "prophylactic" rule, App. 15a, 27a, this was in error. Courts should not impose "substantive changes designed to make the law 'better.' That would give the judiciary entirely too much law-making power." *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012); *Bais Yaakov of Spring Valley*, 852 F.3d at 1082. Indeed, this Court was critical of the Director of the U.S. Patent and Trademark Office for similarly trying to rewrite the America Invents Act:

> Moving past the statute's text and context, the Director attempts a policy argument. Each side offers plausible reasons why its approach might make for the more efficient policy. But who should win that debate isn't

> our call to make. Policy arguments are properly addressed to Congress, not this Court.

SAS Inst., 138 S. Ct. at 1357. Here, as in *SAS Inst.*, only Congress has the right to amend the TCPA to expand the term "advertisement." In the absence of such a directive, courts retain their jurisdiction—just as they did in *SAS Inst.*—to read the "plain meaning" of the TCPA and to decide the proper level of deference afforded to the 2006 FCC Rule.

Had the majority appreciated: (1) the entire paragraph it cited, rather than just the first sentence; (2) definitional terms; (3) successive paragraphs in the 2006 FCC Rule; and (4) the TCPA's purpose, it would have realized "a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA"—as did Judge Thacker's dissent. App. 29a.

III. THIS COURT'S REVIEW IS NEEDED

This case presents an ideal vehicle to resolve the interplay between the Hobbs Act and *Chevron*, as well as the various splits of authority spawned by the Fourth Circuit's rulings related to the TCPA.

First, this case presents a challenge to the jurisdiction of all courts to interpret the law and decide, for themselves, the appropriate level of deference afforded agency guidance under *Chevron*. It also represents an occasion for this Court to delineate the proper scope of the Hobbs Act when the "validity" of an agency's order is *not* challenged.

The central question in this case is: who decides what the law is? Should agencies be permitted to divine Congress's intent with no check by the courts?

The answer, based on over thirty years of case law following this Court's seminal *Chevron* ruling, is no.

Nor did the District Court ever seek to overstep its bounds with respect to the Hobbs Act's reach. As the District Court observed: "The Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA." App. 39a. Instead, the Hobbs Act prohibits facial challenges to the "validity" of an agency's order before a district court. Only in this limited situation would courts "lack the jurisdiction to decide the case," as the District Court itself held. *Id.* (citing *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939 (1984)).

Second, this case highlights the injustice of the Fourth Circuit's ruling. The majority stripped critical meaning from the TCPA—and the 2006 FCC Rule—by removing the universally-recognized limitation that faxes must contain a "commercial nexus" to a firm's business in order to be actionable. At the same time, the majority also impermissibly expanded the scope of TCPA liability nationwide by ruling that all faxes that promote free goods and services are *per se* "advertisements" under the law. The combination of these two rulings will expose innumerably more companies to the "draconian penalties" available under the TCPA—a result the District Court sought to avoid. *Compare Boehringer*, 2018 U.S. Dist. LEXIS 64844, at *23 ("Physicians Healthsource's attenuated notion of 'advertising' would go far beyond the TCPA and effectively ban *all* corporate public service announcements.") (emphasis in original) *with* App. 42a ("Plaintiff's interpretation that any fax that offers a free good or service is barred by the statute is too broad and cannot be borne by the TCPA or the FCC interpretation.").

Third, this case implicates unique and significant concerns over public safety and patient wellness. As discussed, the *Physicians' Desk Reference*© is a "compendium of prescribing information for various prescription drugs." App. 3a. The *Physicians' Desk Reference*© is used by healthcare providers around the country to identify and avoid dangerous drug interactions that could harm patients. As such, any lawful effort to make this free drug reference guide more accessible to healthcare providers—for instance, by notifying them of the option to download a free e-book—should be encouraged, not punished.

The instant case also illustrates the clear and present dangers of a *per se* rule for fax "advertisements." As the post-remand district court in *Boehringer* observed, plaintiff's interpretation "would effectively bar companies from faxing 'disease awareness communications,' which . . . the FDA regarded as a way to 'provide important health information to consumers and health care practitioners, and . . . encourage consumers to seek, and health care practitioners to provide, appropriate treatment.'" 2018 U.S. Dist. LEXIS 64844, at *28 n.4. As such, public policy supports healthcare providers—including, but not limited to, Carlton & Harris—being notified that the *Physicians' Desk Reference*© is available in a "convenient digital format." Prohibiting faxes of this benign nature would chill PDR's (and others) ability to keep healthcare providers informed of life-saving drug interaction information needed to protect patient health—as PDR has done for over 70 years.

Relatedly, and as this Court has recognized, pharmaceutical companies are required to widely

disseminate information about the safety risks and side effects of their products to physicians and other prescribers in order to satisfy state "duty to warn" laws. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2573 (2011) (under Minnesota and Louisiana law, a duty to warn falls on the manufacturer) (citations omitted); *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2474 (2013) (duty to warn under New Hampshire law is part of the "general duty to design, manufacture and sell products that are reasonably safe for their foreseeable uses") (citation omitted). The importance of the *Physicians' Desk Reference*® to population health in the U.S.—and its ability to shield pharmaceutical manufacturers from liability where drug labels were properly written and distributed via the *Physicians' Desk Reference*®—has been consistently recognized in dozens of cases across the country.[11] Restricting PDR's ability to widely disseminate notifications regarding its free drug reference guide being available in other forms would mean pharmaceutical companies would be exposed to more suits based on a failure to warn patients of potentially dangerous drug interactions.

Fourth, and finally, this case demonstrates the immense practical consequences of the Fourth

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[11] *See, e.g., Guevara v. Dorsey Labs., Div. of Sandoz, Inc.*, 845 F.2d 364, 366 (1st Cir. 1988) (use of *Physicians' Desk Reference*® along with package insert to provide warning was adequate); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1097-98 (8th Cir. 2013) (discussing effect of the *Physicians' Desk Reference*® on learned intermediary doctrine and failure to warn); *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 2015 U.S. App. LEXIS 21428, at *11 (6th Cir. Dec. 11, 2015) (same); *U.S. v. Azmat*, 2015 U.S. App. LEXIS 19574, at *42, 53-54 (11th Cir. Nov. 10, 2015) (in admitting expert medical testimony, *PDR* described as "standard reference material").

Circuit's rule due to the scale of potential liability. As repeatedly observed by the Seventh Circuit, the TCPA has been abused by opportunistic class action plaintiffs' attorneys seeking to "nail[] the little guy," while taking advantage of the uncapped statutory damages available under the law. *See, e.g., Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915-16 (7th Cir. 2011) (Posner, J.). By removing the protection of a "commercial aim," and instead imposing a *per se* rule that faxes promoting free goods and services "even at no cost" are "advertisements," the TCPA will become an even larger vehicle for abuse by class action attorneys and their professional plaintiffs. This Court has the opportunity to stem the collective flood of frivolous litigation related to fax transmissions that serve a useful and, in this case, even life-saving purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

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JUNE 21, 2018

No. _____

In The Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons,
Plaintiff – Appellant,
v.
PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10,
Defendants – Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. Robert C. Chambers, District Judge. (3:15-cv-14887)

Argued: October 25, 2017
Decided: February 23, 2018

Before DIAZ, THACKER, and HARRIS, Circuit Judges

Vacated and remanded by published opinion. Judge Diaz wrote the majority opinion, in which Judge Harris joined. Judge Thacker wrote a dissenting opinion.

ARGUED: Glenn Lorne Hara, ANDERSON + WANCA, Rolling Meadows, Illinois, for Appellant. Jeffrey N. Rosenthal, BLANK ROME LLP,

Philadelphia, Pennsylvania, for Appellees. **ON BRIEF:** Brian J. Wanca, ANDERSON + WANCA, Rolling Meadows, Illinois; D. Christopher Hedges, David H. Carriger, THE CALWELL PRACTICE PLLC, Charleston, West Virginia, for Appellant. Ana Tagvoryan, BLANK ROME LLP, Los Angeles, California; Marc E. Williams, Robert L. Massie, NELSON, MULLINS, RILEY & SCARBOROUGH LLP, Huntington, West Virginia, for Appellees.

DIAZ, Circuit Judge:

Carlton & Harris Chiropractic, Inc. appeals from the district court's dismissal of its claim against PDR Network, LLC, PDR Distribution, LLC, PDR Equity, LLC, and John Does 1-10 (collectively, "PDR Network") for sending an unsolicited advertisement by fax in violation of the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227. Carlton & Harris argues that the district court erred in declining to defer to a 2006 Rule promulgated by the Federal Communications Commission (the "FCC") interpreting certain provisions of the TCPA. Specifically, Carlton & Harris contends that the Hobbs Act, 28 U.S.C. § 2342 *et seq.*, required the district court to defer to the FCC's interpretation of the term "unsolicited advertisement." Additionally, to the extent that the district court interpreted the meaning of the 2006 FCC Rule, Carlton & Harris argues that the district court erred by reading the rule to require that a fax have some commercial aim to be considered an advertisement.

Because the Hobbs Act deprives district courts of jurisdiction to consider the validity of orders like the 2006 FCC Rule, and because the district court's

reading of the 2006 FCC Rule is at odds with the plain meaning of its text, we vacate the district court's judgment.

I.

We review a district court's dismissal under Fed. R. Civ. P. 12(b)(6) de novo, "assuming as true the complaint's factual allegations and construing all reasonable inferences in favor of the plaintiff." *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017) (internal quotation marks omitted).

A.

Carlton & Harris maintains a chiropractic office in West Virginia. PDR Network is a company that "delivers health knowledge products and services" to healthcare providers. J.A. 33. Among other things, PDR Network publishes the *Physicians' Desk Reference*, a widely-used compendium of prescribing information for various prescription drugs. PDR Network is paid by pharmaceutical manufacturers for including their drugs in the *Physicians' Desk Reference*.

On December 17, 2013, PDR Network sent Carlton & Harris a fax. The fax was addressed to "Practice Manager" and its subject line announced: "FREE 2014 *Physicians' Desk Reference* eBook — Reserve Now." J.A. 23. The fax invited the recipient to "Reserve Your Free 2014 *Physicians' Desk Reference* eBook" by visiting PDR Network's website. *Id.* It included a contact email address and phone number. The fax touted various benefits of the e-book, noting that it contained the "[s]ame trusted,

FDA-approved full prescribing information . . . [n]ow in a new, convenient digital format" and that the e-book was "[d]eveloped to support your changing digital workflow." *Id.* At the bottom of the fax, a disclaimer provided a phone number the recipient could call to "opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax." *Id.* Finally, the fax advised that Carlton & Harris had received the offer "because you are a member of the PDR Network." *Id.*

B.

Carlton & Harris sued PDR Network in the Southern District of West Virginia, asserting a claim under the TCPA. The TCPA, as amended by the Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359, generally prohibits the use of a fax machine to send "unsolicited advertisement[s]." 47 U.S.C. § 227(b)(1)(C). It creates a private cause of action that permits the recipient of an unsolicited fax advertisement to seek damages from the sender and recover actual monetary loss or $500 in statutory damages for each violation. 47 U.S.C. § 227(b)(3). If a court finds that the sender "willfully or knowingly violated" the TCPA, damages may be trebled. *Id.* Carlton & Harris seeks to represent a class of similarly situated recipients of unsolicited faxes offering free copies of the *Physicians' Desk Reference* e-book.

PDR Network moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. It argued that the fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for

sale. In response, Carlton & Harris pointed to a 2006 FCC Rule interpreting the term "unsolicited advertisement." Pursuant to its statutory authority to "prescribe regulations to implement the requirements" of the TCPA, *see* 47 U.S.C. § 227(b)(2), the FCC promulgated a rule providing that "facsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." *See* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006) (the "2006 FCC Rule"). Carlton & Harris argued that the fax it received was an unsolicited advertisement as defined in the 2006 FCC Rule because it promoted a good at no cost. Moreover, Carlton & Harris argued that the district court was obligated to follow the 2006 FCC Rule pursuant to the Hobbs Act.

The district court disagreed. The court held that the Hobbs Act did not compel the court to defer to "the FCC's interpretation of an unambiguous statute." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-14887, 2016 WL 5799301, at *4 (S.D. W. Va. Sept. 30, 2016). The district court considered the TCPA's own definition of "unsolicited advertisement" "clear and easy to apply," and thus held that it was not required to follow the 2006 FCC Rule and "decline[d] to defer" to it. *Id.* (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The district court further held that even under the 2006 FCC Rule, PDR Network's fax was still not an advertisement because the rule requires an advertisement to have a "commercial aim," and no such aim existed here. *Id.* Accordingly, the district court concluded that

Carlton & Harris had not stated a valid claim under the TCPA and granted PDR Network's motion to dismiss. *Id.* This appeal followed.

II.

The question presented is whether and when a fax that offers a free good or service constitutes an advertisement under the TCPA. To resolve it, we must answer two more: first, must a district court defer to an FCC interpretation of the TCPA? And if so, what is the meaning of "unsolicited advertisement" under the 2006 FCC Rule? We address these issues in turn.

A.

The TCPA defines "unsolicited advertisement" to include "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). In a typical case of statutory interpretation where an agency rule is involved, the familiar *Chevron* framework requires a court to first ask whether the underlying statute is ambiguous ("step one"). *See Chevron*, 467 U.S. at 843; *Montgomery Cty., Md. v. F.C.C.*, 811 F.3d 121, 129 (4th Cir. 2015). Where a statute's meaning is clear on its face, the inquiry ends and the unambiguous meaning controls. *Chevron*, 467 U.S. at 842–43.

In this case, the district court applied step one of *Chevron* to the TCPA's definition and found it to be unambiguous. Thus, it declined to defer to the FCC

interpretation. We conclude, however, that the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, precluded the district court from even reaching the step-one question.

The Hobbs Act, also known as the Administrative Orders Review Act, provides a mechanism for judicial review of certain administrative orders, including "all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1).[1] A party aggrieved by such an order may challenge it by filing a petition in the court of appeals for the judicial circuit where the petitioner resides or has its principal office, or in the Court of Appeals for the D.C. Circuit. 28 U.S.C. § 2343. The Hobbs Act specifically vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the orders to which it applies, including FCC interpretations of the TCPA. *See* 28 U.S.C. § 2342. "This procedural path created by the command of Congress promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency" charged

[1] 47 U.S.C. § 402(a) sets forth the procedure to "enjoin, set aside, annul, or suspend any order of the Commission under" the Communications Act, which includes the Telephone Consumer Protection Act. *See* Pub. L. No. 102-243, 105 Stat 2394. Neither party has disputed that the 2006 FCC Rule is the sort of "final order" contemplated by the Hobbs Act.

with overseeing the TCPA. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (internal quotation marks omitted).

The district court erred when it eschewed the Hobbs Act's command in favor of *Chevron* analysis to decide whether to adopt the 2006 FCC Rule. Federal district courts are courts of limited jurisdiction and "possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005) (internal quotation marks omitted); U.S. Const. art. III, § 1. Where, as here, Congress has specifically stripped jurisdiction from the district courts regarding a certain issue, those courts lack the power and authority to reach it.

This sort of "jurisdiction-channeling" provision, especially in the context of administrative law, is "nothing unique." *Blitz v. Napolitano*, 700 F.3d 733, 742 (4th Cir. 2012) (noting that "agency decisions are commonly subject to such" provisions and that "final agency actions are generally reviewed in the courts of appeals"). When *Chevron* meets Hobbs, consideration of the merits must yield to jurisdictional constraints. "[A]n Article III court's obligation to ensure its jurisdiction to resolve a controversy precedes any analysis of the merits . . . [A]rguing that the district court can put off considering its jurisdiction until after step one of *Chevron* . . . turns that traditional approach on its head." *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 447–48 (7th Cir. 2010). Indeed, a district court simply cannot reach the *Chevron* question without "rubbing up against the Hobbs Act's jurisdictional bar." *Id.* at 449. The district court had no power to decide whether the FCC rule was entitled to deference. By refusing to defer to the FCC

rule and applying *Chevron* analysis instead, the court acted beyond the scope of its congressionally granted authority.

Every other circuit to consider the issue has reached the same result. In *Mais v. Gulf Coast Collection Bureau, Inc.*, the Eleventh Circuit reversed a district court finding that an FCC interpretation of the TCPA's "prior express consent" exception was inconsistent with the statute. 768 F.3d at 1113. The court held that because of the Hobbs Act, the district court "lacked the power to consider in any way the validity of the 2008 FCC Ruling." *Id.* The Eighth Circuit, in *Nack v. Walburg*, refused to consider whether an FCC interpretation of the TCPA "properly could have been promulgated" because the Hobbs Act "precludes us from entertaining challenges to the regulation." 715 F.3d 680, 682 (8th Cir. 2013). And in *Leyse v. Clear Channel Broad., Inc.*, the Sixth Circuit held that the Hobbs Act "deprives the district court below—and this court on appeal—of jurisdiction over the argument that the exemption [to the TCPA] was invalid or should be set aside because of procedural concerns." 545 F. App'x 444, 459 (6th Cir. 2013) (unpublished) (amending and superseding *Leyse v. Clear Channel Broad. Inc.*, 397 F.3d 360 (6th Cir. 2012)).

PDR Network urges us to instead follow the Sixth Circuit's decision in *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, which also considered the meaning of "advertisement" under the TCPA. 788 F.3d 218 (6th Cir. 2015). But although *Sandusky* declined to defer to the 2006 FCC Rule because it found the statutory definition unambiguous, that decision made no mention of the

Hobbs Act's jurisdictional bar nor explained how the court overcame it. *See id.* at 223. For that reason, we do not find that decision persuasive here.

B.

PDR Network also argues (and our dissenting colleague agrees) that the Hobbs Act should not apply in this case because the district court did not specifically invalidate the 2006 FCC Rule. Instead, PDR Network contends, the court merely chose not to apply it. *See Carlton & Harris*, 2016 WL 5799301, at *3 ("[T]he Court presumes the FCC's order is valid. Nonetheless, the order's validity does not, *ipso facto*, bind the Court to defer to the FCC's interpretation of the TCPA.").

We find this logic unavailing. The Hobbs Act broadly vests federal appellate courts with exclusive jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" orders like the 2006 FCC Rule. 28 U.S.C. § 2342(1). District courts, by implication, are without jurisdiction to do any of those things. As other courts have recognized, to decide whether the Hobbs Act applies to restrict jurisdiction in a particular case, we look to the "practical effect" of a claim. *See Mais*, 768 F.3d at 1120. It is of no moment whether PDR Network specifically asked the district court to find the rule invalid, or whether the court purported to do so. *See CE Design*, 606 F.3d at 448 ("[R]equest[ing] that the court 'ignore' the rule is just another way of asking it *not* to enforce the rule."). Like the Seventh Circuit, we see no difference in "this fine distinction." *Id.*

Invalidation by any other name still runs afoul of the Hobbs Act's constraints. To hold that a district

court cannot enjoin or set aside a rule but is nevertheless free to ignore it (or "decline[] to defer" to it, *Carlton & Harris*, 2016 WL 5799301, at *4) would allow a party to perform an end run around the administrative process Congress created and instead tackle administrative orders in a district court. Such an approach is contrary to the text of the Hobbs Act, and would undermine Congress's aim of ensuring uniform application of FCC orders. If PDR Network is bent on challenging the validity or prudence of the FCC rule, it must do so through the specific administrative procedure that the Hobbs Act provides.

For these reasons, we hold that the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA. The district court therefore erred by engaging in *Chevron* analysis and "declin[ing] to defer" to the FCC rule.

C.

Although the Hobbs Act prevents the district court (and this court on appeal) from questioning the validity of the 2006 FCC Rule, the court can, and must, interpret what it says. *See Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448, 452–53 (E.D.N.C. 2016) ("[T]he matters of interpreting and applying the FCC's rulings remain within the province of the court."). We therefore consider whether the district court erred in determining that the 2006 FCC Rule requires a fax to have some commercial aim to be considered an "advertisement" for purposes of TCPA liability.

"[O]ur interpretation of regulations begins with their text." *Gilbert v. Residential Funding LLC*, 678

F.3d 271, 276 (4th Cir. 2012). The 2006 FCC Rule provides, in pertinent part:

> [Facsimile] messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR [established business relationship].

The rule also distinguishes messages promoting free goods or services, which are unsolicited advertisements, from communications "that contain only information, such as industry news articles, legislative updates, or employee benefit information," which are not. *Id.*; *see also Sandusky*, 788 F.3d at 223–24.

The district court concluded that even under the 2006 FCC Rule, PDR Network's fax was not an advertisement because the rule includes only faxes with a "commercial aim." *Carlton & Harris*, 2016 WL 5799301, at *5. The district court attempted to "harmonize[] the FCC interpretation with the plain meaning of the TCPA" and concluded that a "blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly obviates the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA." *Id.* at *4.

We disagree. There is no need to "harmonize" a rule whose meaning is plain. And the district court's interpretation doesn't follow from the rule's plain text. A close reading of the rule reveals a different result. The first sentence of the relevant portion is clear and unambiguous. Setting aside the list of examples (which, set off by the words "such as," is meant to illustrate rather than exhaust), it reads: "[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." 2006 FCC Rule. The sentences that follow explain the rationale for that straightforward principle. Offers that are purportedly "free" often have commercial strings attached, either as pretext or as part of an overall marketing campaign.[2] For this reason, the FCC chose to interpret the term "advertisement" broadly to include any offer of a free good or service.

[2] Contrary to our colleague's view, we are not here "attempt[ing] to divine the FCC's intent," *post* at 27 n.2, but simply paraphrasing the text of the FCC Rule.

"The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." *Gilbert*, 678 F.3d at 276 (quoting *Textron, Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003)). From a natural reading of the text of the regulation, we get this simple rule: faxes that offer free goods and services are advertisements under the TCPA. We need not "harmonize" the FCC's rule with the underlying statute, or probe the agency's rationale. Because the plain meaning of the regulation is clear, our interpretive task is complete.

Judge Pierre Leval recently reached a similar conclusion in his concurring opinion in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017). In that case, Boehringer sent an unsolicited fax to physicians inviting them to a free dinner meeting to discuss certain medical disorders. *Id.* at 93. At the time, Boehringer did not sell any drugs that treated those disorders, but was in the process of developing one and had submitted preliminary documents to the FDA for approval. *Id.* at 94.

The district court dismissed the case, holding that the fax was not an advertisement as a matter of law. *See id.* at 93. While the Second Circuit reversed on the basis of the 2006 FCC Rule, it did so recognizing the difficulty of proving a commercial nexus at the pleading stage, and held that the case should advance to discovery to determine whether the meeting in fact had a commercial purpose. *See id.* at 96–97.

But in his concurrence, Judge Leval explained that by reading the 2006 FCC Rule "precisely, sentence by sentence, giving each sentence its natural meaning," a different interpretation emerged requiring no commercial nexus at all. *See id.* at 100–01 (Leval, J., concurring). Specifically, "[b]ecause of the frequency, observed by the [FCC], that messages offering free goods or services in fact mask or precede efforts to sell something, the Commission has adopted a prophylactic presumption that fax messages offering free goods or services *are* advertisements and thus *are* prohibited by § 277." *Id.*

We find Judge Leval's logic persuasive and agree that his is the natural and logical reading of the 2006 FCC Rule.[3] The rule may be overinclusive in that (for example) it may bar an organization from faxing offers for truly free goods and services unconnected to any commercial interest, but prophylactic rules are neither uncommon nor unlawful. *See Friedman v. Heckler*, 765 F.2d 383, 388 (2d Cir. 1985) ("Prophylactic rules . . . cannot, and need not, operate with mathematical precision . . . The mere fact that a regulation operates overbroadly does not render it invalid.").

In any event, given the increasing obsolescence of fax machines, we suspect there will be few occasions where this rule serves to block an entity wishing to offer truly free goods or services from

[3] Our dissenting colleague suggests that we have omitted something from our analysis of *Boehringer*. *See post* at 22 n.1. But we cite the case only to note our agreement with Judge Leval's reading of the FCC Rule.

doing so.[4] And although we do not reach the FCC's intent in enacting the rule, its decision to prohibit all unsolicited offers for free goods or services is (in our view) a reasonable one. A per se rule advances the purpose of the underlying statute by protecting consumers from junk faxes. The rule also helps would-be violators avoid inadvertent liability by eliminating the need for a case-by-case determination of whether a fax is indeed a free offer, or merely a pretext for something more.

The district court expressed concern that this interpretation of the 2006 FCC Rule would undermine the text and purpose of the TCPA, which "seeks to curtail faxes with a commercial nature." *Carlton & Harris*, 2016 WL 5799301, at *4. Relying on the meaning of the words "commercial" and "promote," the court reasoned that the rule cannot mean that all faxes offering free goods and services are advertisements, because that would "read 'commercial' out of the TCPA's definition of 'unsolicited advertisement'—a clear abdication of elementary statutory construction." *Id.* The district court is correct that Congress enacted the TCPA to combat an "explosive growth in unsolicited facsimile advertising, or 'junk fax.'" *See* H.R. Rep. 102–317. But requiring a fax to propose a specific commercial

[4] In his concurrence in *Boehringer*, Judge Leval addressed the concern that his interpretation of the rule would prevent "charitable, nonprofit entities" from sending offers for free goods or services. *See* 847 F.3d at 102–03 (Leval, J., concurring). He noted several reasons why charities or nonprofits might be exempt from liability under the rule. Because there is nothing in the record to suggest PDR Network is such an entity, we need not and do not decide that question here.

transaction on its face takes too narrow a view of the concepts of commercial activity and promotion, and ignores the reality of many modern business models.

This case illustrates why the FCC may have decided to implement so broad a rule. At this point in the litigation, Carlton & Harris has not taken any discovery, and few details of PDR Network's business model have emerged. We do know that PDR Network receives money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*. And nothing in the record suggests that PDR Network is a charity that distributes free e-books without hope of financial gain. Although PDR Network does not charge healthcare providers money for its e-book, it's certainly plausible that the amount of money it receives turns on how many copies of the *Physicians' Desk Reference* it distributes. The free distribution of the e-book, then, may not impose a financial cost on healthcare providers, but PDR Network may nevertheless stand to profit when a provider accepts a free copy.

Moreover, giving away products in the hope of future financial gain is a commonplace marketing tactic. PDR Network purports to offer other services to healthcare providers, and it may offer the *Physicians' Desk Reference* for free in the hopes of establishing relationships with healthcare providers that will lead to future sales of other goods or services. All told, we think it entirely plausible that PDR Network distributes the free e-books to further its own economic interests.

Our musings aside, the FCC through its Congressional mandate to administer and implement the TCPA has declined to require such a fact-based inquiry. PDR Network sent Carlton &

Harris a fax that offered a free good, namely, the *Physicians' Desk Reference* e-book.[5] Accordingly, the fax was an advertisement under the plain meaning of the 2006 FCC Rule.

III.

To sum up, this case asks us to determine the meaning of the word "advertisement." In doing so, we do not start with a blank slate. Instead, we must follow the guideposts that Congress has set out. The Hobbs Act tells us where to look for an answer: the 2006 FCC Rule. And that rule, in turn, tells us what "advertisement" means.

The Hobbs Act requires a district court to follow FCC interpretations of the TCPA, and under the 2006 FCC Rule, PDR Network's fax offering a free good was indeed an advertisement. PDR Network may think the FCC Rule unwise or unfair, but the district court was "without jurisdiction to consider [its] wisdom and efficacy." *Mais*, 768 F.3d at 1121.

For these reasons, we vacate the district court's judgment and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED

[5] The primary cases on which PDR Network relies involve informational faxes rather than offers of free goods or services. *See Sandusky*, 788 F.3d at 220 (fax containing formulary information for prescription drugs); *Physicians Healthsource, Inc. v. Janssen Pharm., Inc.*, No. 12-2132, 2013 WL 486207, at *1 (D.N.J. Feb. 6, 2013) (fax containing information about reclassification of prescription drug for insurance purposes). The 2006 FCC Rule expressly states that informational faxes are not unsolicited advertisements.

THACKER, Circuit Judge, dissenting:

Because I believe that (1) the district court did not exceed its jurisdiction under the Hobbs Act and (2) the 2006 FCC Rule requires a commercial aim, which is not present here, I respectfully dissent.

I.

Hobbs Act Jurisdiction

Carlton & Harris ("Appellant") argues that the district court exceeded its jurisdiction under the Hobbs Act. Appellant asserts that the Hobbs Act precludes any *Chevron* analysis and requires district courts to simply defer to -- or adopt – FCC guidance. *See Chevron, U.S., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–44 (1984). Therefore, Appellant contends, and the majority agrees, that by engaging in a *Chevron* analysis, the district court inappropriately determined the validity of the 2006 FCC Rule. I disagree. In my view, the district court did not actually determine the validity of the 2006 FCC Rule. Therefore, the district court did not exceed its jurisdiction.

A.

Under the Hobbs Act, the federal courts of appeals "ha[ve] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC]." 28 U.S.C. § 2342. Accordingly, Congress entrusts district courts with the singular task of interpreting and enforcing FCC guidance when required. The

Chevron doctrine, which governs judicial review of an agency's construction of a statute, provides a two step tool guiding when a district court must interpret and enforce administrative authority. At step one of the *Chevron* analysis, the court determines whether the statute is ambiguous. *See* 467 U.S. at 842–43. If the statute is clear, "that is the end of the matter" and the court does not defer to the agency construction. *Id.* at 842. If the statute is ambiguous, the court moves to step two. *See id.* at 843. At step two, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The majority concludes that when a court decides that a statute is unambiguous at step one of the *Chevron* analysis and accordingly does not defer to the agency's construction at issue, it necessarily invalidates the agency's construction. Therefore, the majority's reasoning goes, in order to avoid violating the Hobbs Act by deciding the validity of FCC orders, which is the sole purview of the courts of appeal, district courts must simply defer to FCC guidance and cannot engage in any *Chevron* analysis at all. *See ante* at 7 ("We conclude . . . that the Hobbs Act . . . precluded the district court from even reaching the step-one question [of *Chevron*].").

I take issue with the majority's conclusion that the failure of the district court to defer to an agency's construction at step one of the *Chevron* analysis invalidates the agency's construction. Invalidation occurs at step one of *Chevron* only if a court finds that that the agency's construction is in conflict with the unambiguous statutory language. *See, e.g.*, *William v. Gonzales*, 499 F.3d 329, 333–34 (4th Cir. 2007) ("[W]e believe it is evident that [the

regulation] . . . conflicts with the [unambiguous] statute . . . . Therefore, we conclude that this regulation lacks authority and is invalid."); *Foxglenn Inv'rs, Ltd. P'ship v. Cisneros*, 35 F.3d 947, 952 (4th Cir. 1994) (declaring invalid a regulation that rendered a section of an unambiguous statute superfluous); *see also Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (recognizing that the district court invalidated an FCC regulation when it deemed it to be inconsistent with the clear meaning of the TCPA); *Nack v. Walburg*, 715 F.3d 680, 685–86 (8th Cir. 2013) (finding that the argument that an FCC regulation was contrary to the unambiguous language of the TCPA was a facial challenge).

Here, there was no such finding. The district court concluded that the TCPA was unambiguous and therefore did not need to defer to the 2006 FCC Rule. But in reaching that conclusion, the district court did not "determine the validity of" the 2006 FCC Rule. 28 U.S.C. § 2342. To the contrary, the court assumed the 2006 FCC Rule was valid and used it to bolster its interpretation of the TCPA. The district court concluded, "A plain reading of the TCPA and the [2006] FCC [Rule] demonstrates that they intend to curtail the transmission of faxes with a commercial aim." J.A. 135. Critically, the district court did not find the language of TCPA and the 2006 FCC Rule to be in conflict, and logically, by virtue of *using and interpreting* the 2006 FCC Rule, the district court could not have invalidated it. Accordingly, it did not exceed the Hobbs Act's jurisdictional bounds.

B.

The majority points to three cases in support of its jurisdictional analysis: (1) *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013); (2) *Leyse v. Clear Channel Broadcasting, Inc.*, 545 F. App'x 444 (6th Cir. 2013); and (3) *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110 (11th Cir. 2014).[1] The majority posits

[1] The majority also uses *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 847 F.3d 92 (2d Cir. 2017), to interpret the 2006 FCC Rule and adopts the concurring opinion in that case. *See ante* at 14–16. However, it fails to address a significant omission in *Boehringer*. *See id.*

As a matter of background, the district court in *Boehringer* interpreted the 2006 FCC Rule to require a commercial aim. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms.*, Inc., No. 3:14-cv-405, 2015 WL 144728, at *3 (D. Conn. Jan. 12, 2015). It found that this interpretation conformed with the TCPA's prohibition on the unsolicited sending of "material advertising the commercial availability or quality of any property, goods, or services" and the FCC's exclusion of "messages that do not promote a commercial product or service" from unsolicited advertisements. *Id.* (internal quotation marks omitted). There was no facial challenge to the 2006 FCC Rule, and the district court did not determine that the TCPA and the 2006 FCC Rule were in conflict. The district court further held that Physicians Healthsource failed to plead specific facts to prove a commercial element and therefore dismissed the claim. *See id.* at *5–*6.

On appeal to the Second Circuit, Physicians Healthsource argued in its opening brief that the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule." Appellant's Br. at 22, *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc.*, No. 15-288 (2d Cir. Feb. 2, 2015; filed Mar. 27, 2015), ECF No. 27. The Second Circuit did not address this argument and instead addressed the merits, determining that the 2006 FCC Rule required a commercial aim. *See Boehringer*, 847 F.3d at 95–96. The court ultimately vacated and remanded the case for

that these cases demonstrate that "[e]very other circuit to consider the [jurisdictional] issue has reached the same result." *Ante* at 9. But these cases are inapposite.

In both *Nack* and *Leyse*, the issue presented was a facial challenge to an FCC regulation. In *Nack*, the defendant asserted an affirmative defense that the FCC regulation, as the basis of the plaintiff's action, was contrary to the unambiguous language of the TCPA. *See* 715 F.3d at 685–86. The Eighth Circuit construed this argument as a challenge to the validity of the regulation. *See id.* Accordingly, the district court violated the Hobbs Act by considering it. *See id.* In *Leyse*, the plaintiff argued to the district court that the FCC rule was invalid or should be set aside because of procedural deficiencies in its promulgation. *Leyse*, 545 F. App'x at 458. On appeal, the plaintiff characterized his argument as an as-applied challenge and contended that the lawsuit was not "a proceeding to enjoin, set aside, annul, or suspend an order of the [FCC], and therefore was not barred by the Hobbs Act." *Id.* at 455 (internal quotation marks omitted). The Sixth Circuit determined that the plaintiff's attacks were "exactly the kind of facial attacks on the validity of FCC orders that the Hobbs Act meant to confine." *Id.* at 458. Accordingly, the Sixth Circuit concluded that the Hobbs Act deprived the district court of

discovery upon concluding that Physicians Healthsource successfully stated a claim for relief. *See id.* at 96–97.

I see no difference between the district court's decision in *Boehringer* and the district court's decision here. As in *Boehringer*, the district court here interpreted the 2006 FCC Rule in accordance with the TCPA to require a commercial aim.

jurisdiction over the argument that the FCC regulation was invalid. *See id.* at 459.

In contrast, here there is no facial challenge to the 2006 FCC Rule. Appellant did not argue to the district court that the 2006 FCC Rule is contrary to the plain language of the TCPA. It also did not argue that the 2006 FCC Rule should be set aside due to procedural deficiencies. Appellant merely argued for a specific interpretation of the 2006 FCC Rule, and Appellee argued for a different interpretation.

Mais is also distinguishable. In *Mais*, the district court refused to afford any deference to the FCC rule because the rule conflicted with the clear meaning of the TCPA. *See Mais*, 768 F.3d at 1115. The Eleventh Circuit held that "the district court exceeded its jurisdiction by declaring the . . . FCC [r]uling to be inconsistent with the TCPA." *Id.* at 1119. The Eleventh Circuit determined that "[b]y refusing to enforce the FCC's interpretation" because it was inconsistent with the TCPA, "the district court exceeded its power." *Id.* at 1119. Here, the district court did not find that the TCPA and the 2006 FCC Rule were in conflict. To the contrary, the district court assumed the 2006 FCC Rule was valid and harmonized the rule with its conclusions about the TCPA.

II.

Chevron Analysis

I now turn to whether an "unsolicited advertisement" under the TCPA must have a commercial aim. In doing so, I apply the familiar *Chevron* framework. *See Chevron, U.S., Inc. v. Nat.*

Res. Def. Council, 467 U.S. 837, 842–44 (1984). At step one, I conclude that the TCPA is ambiguous as to whether a fax must have a commercial aim to be an "advertisement." Accordingly, I would defer to the 2006 FCC Rule. At step two, I determine that in order for a fax to be an "advertisement," the 2006 FCC Rule requires that it have a commercial aim. Thus, I would affirm the district court.

A.

At step one of the *Chevron* analysis, we must determine whether the TCPA's definition of "unsolicited advertisement" unambiguously requires faxes to have a commercial aim. Under the TCPA, a person may not "send, to a telephone facsimile machine, an unsolicited advertisement" unless certain notice requirements are met. 47 U.S.C. § 227(b)(1)(C). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services." *Id.* § 227(a)(5). Because (1) "advertis[ing]" does not definitely implicate a profit seeking motive; and (2) "commercial" may or may not modify "quality," I conclude that the TCPA is ambiguous on this point.

When interpreting statutory language, we begin by giving the words of the statute their plain meaning. *See Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012). According to the New Oxford American Dictionary, "advertise" means to "describe or draw attention to . . . in a public medium in order to promote sales or attendance." *Advertise*, New Oxford American Dictionary (3d ed. 2010). But the word is also commonly understood to

not necessarily implicate a profit seeking motive. The New Oxford American Dictionary further defines "advertise" as to "notify (someone) of something" and to "make (a quality or fact) known." *Id.* Additionally, while the New Oxford American Dictionary defines "commercial" as "making or intended to make a profit," the TCPA's definition of "unsolicited advertisement" is unclear as to whether "commercial" modifies "quality." *Commercial*, New Oxford American Dictionary (3d ed. 2010).

The plain language of the statute suggests two competing interpretations: one that requires a commercial aim and one that does not. It follows that a commercial aim *would not be* required if one accepts the common usage of "advertise" and believes "commercial" is divorced from "quality." Under this interpretation, a fax that simply points out the quality of a good would qualify as an unsolicited advertisement. But, it also follows that a commercial objective *would be* required if one accepts the "promote sales or attendance" definition of "advertise" and believes "commercial" modifies "quality." As a result, the TCPA is ambiguous.

B.

I thus move on to step two of the *Chevron* analysis. At step two, I conclude that the 2006 FCC Rule requires a commercial aim and is entitled to substantial deference because it is a "permissible" construction of the TCPA. *Chevron*, 467 U.S. at 843.

The majority determines that a "natural and logical reading" of the 2006 FCC Rule creates a prophylactic rule that all faxes offering free goods and services are "unsolicited advertisements" under

the TCPA. *Ante* at 15. But in my view, the 2006 FCC Rule makes clear that even faxes that purport to have no commercial aim on their face must nonetheless have a commercial aim in order to be an "advertisement" under the TCPA.

The 2006 FCC Rule states:

> facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an [established business relationship].

Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006).

As noted, in interpreting an agency's construction, we begin with the text.[2] *See Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012). A plain reading of the 2006 FCC Rule demonstrates that its objective is to prevent faxes with a commercial aim. Its objective is not to prevent faxes that promote free goods or services per se. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharms., Inc.*, 847 F.3d 92, 96 (2d Cir. 2017). The 2006 FCC Rule explains that the "free" offering is "often part of an overall marketing campaign" and "the products promoted within the ['free'] publication are often commercially available." 71 Fed. Reg. at 25,973. In this way, the 2006 FCC Rule reflects the reality that "[b]usinesses are always eager to promote their wares and usually do not fund [publications, presentations, goods, or services] for no business purpose." *Boehringer*, 847 F.3d at 95.

In order to reach its conclusion, the majority reads the first sentence of the 2006 FCC Rule -- "[F]acsimile messages that promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." -- in isolation. 71 Fed. Reg. at 25,973; *see ante* at 13 ("The first sentence of the relevant portion is clear and unambiguous."). To be sure, if read in a vacuum, the first sentence seems

[2] The majority's interpretation of the 2006 FCC Rule goes beyond the plain meaning of the text. The majority attempts to divine the FCC's intent when it states: "Offers that are purportedly 'free' often have commercial strings attached . . . . For this reason, the FCC chose to interpret the term 'advertisement' broadly to include any offer of a free good or service." *Ante* at 13.

to create a prophylactic rule. However, it is informed by the language that follows.

Specifically, the second sentence of the 2006 FCC Rule redefines the subject faxes as those promoting free offerings with a commercial aim. It states, "In many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." 71 Fed. Reg. at 25,973. The 2006 FCC Rule then refers to "such messages" -- redefined as those with a commercial aim -- and explains, "[I]t is reasonable to presume that such messages describe the 'quality of any property, goods, or services.'" *Id.* Reading the 2006 FCC Rule as a whole, taking into account every sentence, reveals that a fax with a free offering must necessarily include a commercial aim to qualify as an "advertisement" under the TCPA.

This is a "permissible" construction. *Chevron*, 467 U.S. at 843. "A construction is permissible if it is reasonable . . . ." *Cetto v. LaSalle Bank Nat'l Ass'n*, 518 F.3d 263, 275 (4th Cir. 2008). This construction is certainly reasonable because it "is a logical interpretation and fits into one of two possible interpretations of the statute based on the plain meaning of the text." *Id.* at 276. Accordingly, this interpretation must be accepted.

III.

Pleading Standard

Having determined that the 2006 FCC Rule requires a commercial aim, I now turn to the relevant pleading standard. Because the TCPA is a remedial statute, it "should be liberally construed

and . . . interpreted . . . in a manner tending to discourage attempted evasions by wrongdoers." *Scarborough v. Atl. Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949); *see Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013) ("The TCPA is a remedial statute that was passed to protect consumers . . . ."). "[R]equiring plaintiffs to plead specific facts" showing a commercial aim "would impede the purposes of the TCPA" because plaintiffs will likely face difficulty in discerning whether a fax has a commercial aim. *See Boehringer*, 847 F.3d at 96. Indeed, the 2006 FCC Rule recognizes this fact by highlighting that "in many instances 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." 71 Fed. Reg. at 25,973.

Accordingly, the burden at the pleading stage is minimal. "[W]here it is alleged that a firm sent an unsolicited fax promoting a free [publication containing products or services] that relate[] to the firm's [business], there is a plausible conclusion that the fax had the commercial purpose of promoting those products or services." *Boehringer*, 847 F.3d at 95. A plaintiff satisfies its burden at the pleading stage where facts are alleged that the publication's contents relate to the defendant's business. *See id.* at 96 ("There must be a commercial nexus to a firm's business, i.e., its property, products, or services; that, in our view, is satisfied at the pleading stage where facts are alleged that the subject of the free seminar relates to that business."). If the plaintiff meets this minimal burden, the defendant may rebut the inference, but only after discovery.

Here, Appellant has not met even this minimal burden. Appellant merely states in its complaint:

"Each of the [Appellees] benefit or profit from the sale of the . . . [eBook]." J.A. 11 ¶ 12. This statement is contradicted by the fax itself, which demonstrates that the eBook is not offered for sale. *See id.* at 23 ("FREE 2014 *Physicians' Desk Reference* eBook -- Reserve Now"). Appellant does not even hint that the contents of the eBook relate to Appellees' business. Thus, Appellant has failed to state a claim.

IV.

For the foregoing reasons, I would affirm the district court, and I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
WEST VIRGINIA
HUNTINGTON DIVISION

CIVIL ACTION NO. 3:15-14887

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia corporation, individually and as a representative of a class of similarly-situated persons, Plaintiff,
v.
PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, PDR EQUITY, LLC, and JOHN DOES 1-10, Defendants.

MEMORANDUM OPINION AND ORDER

Pending is a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) and a Motion for Judicial Notice under Federal Rule of Evidence 201, both brought by Defendants PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR"). ECF Nos. 18, 20. Oral argument on the two motions was held on September 29, 2016. For the reasons below, the Court **GRANTS** both motions.

I. Background

This is a putative class action brought pursuant to the Telephone Consumer Protection Act of 1991 as amended by the Junk Fax Prevention Act of 2005 ("TCPA"), 47 U.S.C. § 227, claiming PDR sent unsolicited fax advertising in violation of the TCPA.

According to the Complaint, PDR sent a single fax to Plaintiff's office. The fax, which is attached to the Complaint, offers the recipient a free "Physicians' Desk Reference eBook." The fax describes the reference book as containing the "[s]ame trusted, FDA-approved full prescribing information." The fax also provides a website which the recipient can visit to download the book, a customer service email and phone number, and a prominent picture of an electronic device with the cover of the book displayed. Plaintiff contends that this single fax is an unsolicited advertisement and its transmission is in violation of the TCPA. PDR's motion to dismiss contends that the fax is not an advertisement as a matter of law because it does not offer anything for purchase or sale. The Court agrees.

II. Legal Standard

When considering a motion to dismiss pursuant to Rule 12(b)(6), a court follows a two-step approach: (1) "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and then (2) "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

For the first step, the complaint must provide the plaintiff's "grounds of . . . entitlement to relief" in more factual detail than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. "While legal

conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

For the second step, a court must take the remaining factual allegations in the complaint as true, and view them in the light most favorable to the plaintiff. *See Twombly*, 550 U.S. at 555–56. The complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id.* at 555, 570 (internal quotation marks omitted). Plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

III. Discussion

A. Judicial Notice

PDR asks the Court to take judicial notice of an exhibit attached to the Motion to Dismiss—a printout from PDR Network's website—to help the Court decide the Motion to Dismiss. A court may consider information susceptible to judicial notice on a 12(b)(6) motion to dismiss. When deciding a 12(b)(6) motion to dismiss "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine . . . in particular, . . .

matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B Wright & Miller § 1357 (3d ed. 2004 and Supp. 2007)); *see also Katyle v. Penn Nat. Gaming, Inc.*, 637 F.3d 462, 466 (4th Cir. 2011) (citing *Tellabs*, 551 U.S. at 322). "A court may take judicial notice of information publically announced on a party's web site, so long as the web site's authenticity is not in dispute and it is capable of accurate and ready determination." *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 Fed.Appx. 223, 227 (4th Cir. 2013) (citing Fed. R. Evid. 201(b); *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("it is not uncommon for courts to take judicial notice of factual information found on the world wide web.")).

The webpage supplied by PDR is from PDR's "About Us" website. The printout notes that PDR "provides healthcare professionals multichannel access to important drug information: the [Physicians' Desk Reference], the most recognized drug information reference available in the U.S." Def's. Req. for Judicial Notice Ex. 1, ECF No. 18-1. Plaintiff does not disput the authenticity of the printout from PDR's website, and the information contained in the printout is capable of accurate and ready determination. Accordingly, the Court takes judicial notice of the printout from PDR's website.

Moreover, during oral argument, Plaintiff did not dispute Defendants' description of the reference book or of PDR itself as an informational resource which is free to recipients and that PDR the company does not sell the reference or sell anything in the reference.

B. The Motion to Dismiss

PDR argues the Class Action Complaint should be dismissed because the sole fax at issue in this TCPA action is not an advertisement as a matter of law. PDR Network maintains the fax is not an advertisement because it (1) does not offer anything for purchase or sale, and (2) its primary purpose is to inform members, not sell a product or service. Defs' Memo. Supp. Mot. Dismiss 7, ECF No. 19.

In general, the TCPA forbids a person "to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). "Unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission, in writing or otherwise." 47 U.S.C. § 277(a)(5). "An advertisement is any material that promotes the sale (typically to the public) of any property, goods, or services available to be bought or sold so some entity can profit." *Sandusky Wellness Ctr., LLC v. Medco Health Sols.*, 788 F.3d 218, 222 (6th Cir. 2015) (citing 47 U.S.C. § 227(a)(5); *Advertisement*, BLACK'S LAW DICTIONARY (10th ed.)); *see also N.B. Indus. v. Wells Fargo Co.*, 465 F.App'x. 640, 642 (9th Cir. 2012) (citing *Commerce* THE AMERICAN HERITAGE DICTIONARY (3d ed. 1994) ("To be commercially available within the meaning of [TCPA], a good or service must be available to be bought or sold (or must be a pretext for advertising a product that is so available."). As such, in order for

an unsolicited fax to become an advertisement the fax must have a commercial aim.

Case law from other federal courts likewise interpret the TCPA to require a commercial element to find that a fax is an advertisement. The Ninth Circuit Court of Appeals found that the subject of an unsolicited fax was not an advertisement because the subject of the fax—an award—"is not commercially available and, therefore, the description of the award, the application to apply for it, and the text encouraging recipients to apply are not unsolicited advertisements within the meaning of the [TCPA]." *N.B. Indus.*, 465 F.App'x. at 642.

Other district courts have held that where the sender of an unsolicited fax had nothing to sell, even if offering a good or service, the fax was not an advertisement. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, No. 3:14-cv-405, 2015 WL 144728, at *5 (D. Conn. Jan. 12, 2015) (finding that a fax sent by a drug manufacturer offering a free seminar that addressed a disorder for which the manufacturer was developing a drug but which was not yet available for sale was not an advertisement); *Phillips Randolph Enters., LLC. v. Adler-Weiner Research Chicago, Inc.*, 526 F.Supp.2d 851, 853 (N.D. Ill. 2007) (finding a fax notifying the recipient of a new research study on health care program was not an advertisement); *Ameriguard Inc. v. Univ of Kan. Medical Ctr.*, No. 06-0369-CV, 2006 WL 1766812, at *1 (W.D. Mo. Jun. 23, 2006) (finding a fax seeking participants in a clinical research trial not an advertisement because there was no "commercial availability" of any goods or services). "Indeed, the potential to gain some benefit from sending information, without the presence of

additional commercial statement in the message, is insufficient to transform an informational message to an advertisement." *Physicians Healthsource, Inc. v. Janssen Pharms., Inc.*, No. 12-2132, 2013 WL 486207, at *4 (D.N.J. Feb. 6, 2013).

In light of this raft of authority, the single fax at issue here is not an "advertisement" as defined by the TCPA. The fax certainly offers a good to Plaintiff but neither the fax nor PDR exhibit a commercial aim. The fax offers, for free, a reference book that contains information about prescription drugs. PDR does not sell prescription drugs, nor does it sell the reference book. The essential commercial element of an advertisement is missing from the fax; that is, there is no "hope to make a profit" from the offer and distribution of the reference book. *Sandusky*, 788 F.3d at 222. Moreover, although it is *possible* that PDR accrues some commercial benefit from distribution of the reference book, Plaintiff has not alleged any facts, other than a conclusory recitation of the elements of a TCPA claim, that plausibly indicates that PDR gains financially from the distribution of the reference book beyond speculative or ancillary gains. *See Twombly*, 550 U.S. at 555–56 (finding the complaint must contain "enough facts to state a claim to relief that is plausible on its face."); *Janssen Pharms., Inc.*, 2013 WL 486207, at *4 ("whether the sender will ultimately obtain an ancillary commercial benefit from sending an informational message does not alter [the fact that the fax is not an advertisement]."). In light of the information properly before the Court, the fax sent is not commercial in nature and therefore is not an advertisement.

Plaintiff strenuously urges this Court to adopt the Federal Communications Commission's ("FCC") order interpreting the TCPA's definition of "unsolicited advertisement." *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 Junk Fax Prevention Act of 2005*, 21 F.C.C. Rcd. 3787, 3814 (2006). Plaintiff argues that the FCC order creates a presumption that any fax that offers free services or goods is an advertisement and PDR's fax offers a free good and should therefore be considered an advertisement. *See id.* Plaintiff further contends that the Hobbs Act requires this Court to adopt the FCC's order. *See* 28 U.S.C. § 2342(1). Regardless of whether Plaintiff's interpretation of the FCC order is correct, Plaintiff is mistaken about the effect of the Hobbs Act.

The Hobbs Act does not require a federal court to adopt an FCC interpretation of the TCPA. The Hobbs Act vests exclusive jurisdiction to "enjoin, set aside, suspend, or to determine the validity of all final orders of the [FCC]" in the Circuit Courts of Appeals. *Id.* Neither party in this case has challenged the validity of the FCC's interpretation of the TCPA. If they had, this Court would lack the jurisdiction to decide the case. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984). Indeed, for the purposes of this case, the Court presumes the FCC's order is valid.

Nonetheless, the order's validity does not, *ipso facto*, bind the Court to defer to the FCC's interpretation of the TCPA. The Court is not obliged to defer to the FCC's interpretation of an unambiguous statute. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837,

843 (1984). The TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). This definition is clear and easy to apply. *See Sandusky*, 788 F.3d at 223; *Janssen Pharms., Inc.*, 2013 WL 486207, at *3. Thus, FCC's interpretation of the TCPA is not due "substantial deference," *see Chevron*, 467 U.S. at 843–44, and in light of the clarity of the TCPA and case law applying it, the Court declines to defer to the FCC's interpretation.

Nonetheless, even if the Court were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision. The FCC concludes that "facsimile messages that promote goods or services, even at no cost, . . . are unsolicited advertisements under the TCPA's definition." 21 F.C.C. Rcd. at 3814. According to the FCC's interpretation, the offending message must "promote goods or services." "Promote" is defined as "[t]o publicize or advertise . . . so as to increase sales." *Promote*, OXFORD ENGLISH DICTIONARY (3d ed. 2007). Or "to present (merchandise) for buyer acceptance through advertising, publicity, or discounting." *Promote*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/promote?utm_campaign=sd&utm_medium=serp&utm_source=jsonld. "Promote" has an explicit commercial nature, meaning that faxes that offer free goods or services must aim, through those goods and services, to garner a buyer's acceptance or attempt to increase

sales. The fax here cannot be read to "promote" anything other than information.

Indeed, to define promote to have a commercial nature harmonizes the FCC interpretation with the plain meaning of the TCPA. The TCPA unequivocally defines "unsolicited advertisement" as commercial in nature. 47 U.S.C. § 277(a)(5). The plain meaning of "promote" likewise has a commercial aim. To read the FCC interpretation in any other way would read "commercial" out of the TCPA's definition of "unsolicited advertisement"—a clear abdication of elementary statutory construction. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (quoting *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute.").

The FCC then goes on to explain its rationale for its characterization of faxes that promote free goods and services. It explains "[i]n many instances . . . 'free' publications are often part of an overall marketing campaign to sell property, goods, or services." 21 F.C.C. Rcd. at 3814. The FCC's guidance makes it clear that the evil to be combatted are faxes that are either overtly commercial in nature, meaning they directly offer something for sale, or are a pretext for a commercial transaction that will inevitably follow from the fax. *See Drug Reform Coordination Net. V. Grey House Pub.*, 106 F. Supp. 3d 9, 13 (D.D.C. 2013) (holding that a fax that was not an unsolicited advertisement on its face was nonetheless an advertisement because three direct

solicitation emails followed). The TCPA, as already explained, seeks to curtail faxes with a commercial nature. To read the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspect either directly or indirectly obviates the eminently rational purpose to the FCC's guidance and strips essential meaning from the TCPA.

A plain reading of the TCPA and the FCC interpretation demonstrates that they intend to curtail the transmission of faxes with a commercial aim. Plaintiff's interpretation that any fax that offers a free good or service is barred by the statute is too broad and cannot be borne by the TCPA or the FCC interpretation.

The Court need not reach the disputed and thorny[1] issue of whether the TCPA is a remedial statute and if it should be read broadly or plainly. This Opinion and Order finds that the fax at issue is clearly not an advertisement, rendering the dispute over the remedial nature of the statue moot.

In sum, the TCPA prohibits unsolicited advertisements sent via fax. The TCPA unambiguously requires a fax to be commercial in nature to be considered an advertisement. PDR's fax

[1] *See, e.g., Gager v. Dell Fin. Servs, LLC.*, 727 F.3d 265, 271 (3d Cir. 2013) (finding TCPA remedial); *Hooters of Augusta v. Am. Glob. Ins. Co.*, 272 F.Supp.2d 1365, 1376–77 (S.D. Ga. 2003) (finding TCPA to be punitive); *see also Sandusky*, 788 F.3d at 224 (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 364–66 (2012)) ("Why interpret a statute's language broadly or narrowly (as opposed to just reasonably or fairly)? And since all statutes remedy what's seen as a problem, which statutes do *not* deserve broad construction?") (emphasis in original).

neither offers anything for sale, nor does PDR plausibly benefit commercially from the free distribution of the Physicians' Desk Reference. Accordingly, PDR's fax is not commercial in nature and therefore not an advertisement as defined by the TCPA.

IV. Conclusion

For the above reasons, the Court **GRANTS** PDR Network's Motion to Dismiss the Class Action Complaint under Federal Rule of Civil Procedure 12(b)(6), and **GRANTS** the Motion for Judicial Notice.

The Court **DIRECTS** the Clerk to send a copy of this Opinion and Order to counsel of record and any unrepresented parties.

ENTER: September 30, 2016

/s/ ROBERT C. CHAMBERS, CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON DIVISION

CIVIL ACTION NO. 3:15-14887

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia corporation,individually and as a representative of a class of similarly-situated persons, Plaintiff,
v.
PDR NETWORK, LLC, PDR DISTRIBUTION, LLC, PDR EQUITY, LLC, and JOHN DOES 1-10, Defendants.

JUDGMENT ORDER

In accordance with the accompanying order, the Court **GRANTS** Defendants' Motion to Dismiss and **ORDERS** that this case be dismissed and stricken from the docket of this Court.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to all counsel of record, and any unrepresented parties.

ENTER: September 30, 2016

/S/ ROBERT C. CHAMBERS. CHIEF JUDGE

FILED: March 23, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185
(3:15-cv-14887)

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons Plaintiff – Appellant

v.

PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10 Defendants – Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: April 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2185 (3:15-cv-14887)

CARLTON & HARRIS CHIROPRACTIC, INC., a West Virginia Corporation, individually and as the representative of a class of similarly-situated persons Plaintiff – Appellant
v.
PDR NETWORK, LLC; PDR DISTRIBUTION, LLC; PDR EQUITY, LLC; JOHN DOES 1-10 Defendants - Appellees

M A N D A T E

The judgment of this court, entered February 23, 2018, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

47 USCS§ 227 (excerpts)

Restrictions on use of telephone equipment:

(a) Definitions. As used in this section—

. . .

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

. . .

(b) Restrictions on use of automated telephone equipment.

. . .

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to

receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions. If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

. . .

75 FR 25967 (excerpts)

. . .

Offers for Free Goods and Services and Informational Messages

The Commission concludes that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition. In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services." Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules.

. . .

Hobbs Act (excerpts)

§ 2342. Jurisdiction of court of appeals

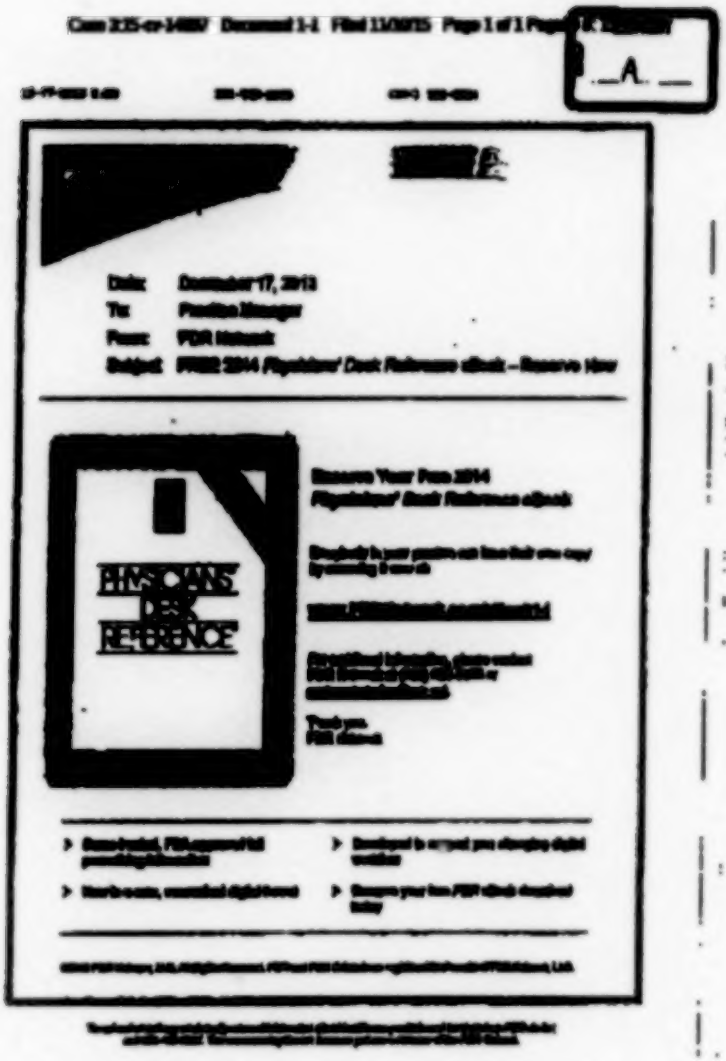
The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--
(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

. . .

§ 2343. Venue

The venue of a proceeding under this chapter [*28 USCS §§ 2341* et seq.] is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

. . .


PHYSICIANS
DESK
REFERENCE

No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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August 29, 2018

QUESTIONS PRESENTED

1. Whether the Court should deny certiorari on the "jurisdictional question" raised in the Petition, where every circuit court to address the question has held that, under the Hobbs Act, 28 U.S.C. § 2342(1), a district court has no power to review a "final order" of the FCC interpreting the Telephone Consumer Protection Act of 1991 ("TCPA"). *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539; *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. App'x 444, 459 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 57; *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445–50 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933.

2. Whether the Court should decline to grant certiorari to resolve a minor difference of interpretation between the Fourth Circuit and the Second Circuit regarding the scope of the FCC's 2006 Rule stating that facsimiles offering "free goods and services" are "advertisements," as defined by the TCPA, 47 U.S.C. § 227(a)(5), where the answer will not change the result in this case and where this esoteric question is infrequently litigated.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners, who were Defendants below, are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR").

Respondent, which was Plaintiff below, is Carlton & Harris Chiropractic, Inc. ("Plaintiff"). Plaintiff has no parent corporation, and no publicly held company owns 10% or more of Plaintiff's corporate stock.

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II. The difference of interpretation between the Second Circuit and the Fourth Circuit regarding the meaning of the FCC's free-goods-or-services rule does not warrant this Court's review. 15

III. The Fourth Circuit's ruling does not "prohibit" PDR from sending faxes offering free copies of its e-book, as long as it follows the rules. 19

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RESPONDENT'S BRIEF IN OPPOSITION

The Petition seeks this Court's review of a decision of the U.S. Court of Appeals for the Fourth Circuit holding that a facsimile (or "fax") sent to Plaintiff's chiropractic office is an "advertisement" under the Telephone Consumer Protection Act of 1991 ("TCPA"), as that term is interpreted by the Federal Communications Commission ("FCC"), and thus subject to the rules governing fax advertising contained in the TCPA and the FCC regulations.

The Court should deny the petition because (1) every circuit court to decide the question has ruled that the FCC's interpretations of the TCPA are binding in district courts and may be challenged only by following the procedures in the Administrative Orders Review Act (the "Hobbs Act"), 28 U.S.C. § 2342(1), and there is no "circuit split" on this issue, as the Petition contends; and (2) the difference of interpretation between the Second Circuit and the Fourth Circuit regarding the meaning of the FCC's 2006 rule stating that faxes offering "free goods or services" are presumed to be "advertisements" does not warrant this Court's review.

STATEMENT OF THE CASE

On November 10, 2015, Plaintiff filed its Complaint alleging that Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR") sent Plaintiff and a class of others "unsolicited advertisements" in violation of the TCPA, 47 U.S.C. § 227, and the implementing FCC

regulations, 47 C.F.R. § 64.1200, including a fax on December 17, 2013 (the "Fax").

The Fax is addressed to "Practice Manager" from "PDR Network" and offers a "FREE 2014 Physicians Desk Reference eBook." (Pet. App. 51a). Fine print at the bottom of the Fax states: "To opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax, call 866-469-8327. You are receiving this fax because you are a member of the PDR Network." (*Id.*) The Complaint seeks the relief authorized by the TCPA's private right of action, 47 U.S.C. § 227(b)(3), consisting of statutory damages of $500 to $1,500 per violation and injunctive relief. (Pet. App. 47a–48a).

On February 5, 2016, PDR moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). PDR did not dispute that Plaintiff adequately alleged the Fax was "unsolicited," but argued that the Fax is not an "advertisement" as a matter of law because it "does not offer anything for purchase or sale," instead offering a "free" copy of the 2014 eBook. (Pet. App. 33a).

On March 4, 2016, Plaintiff filed its opposition to the motion to dismiss, arguing that the FCC issued a final order in 2006 interpreting the term "advertisement" in 47 U.S.C. § 227(a)(5), and ruling that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the

TCPA's definition." (Pet. App. 49a; *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006) ("2006 FCC Rule")). Plaintiff argued that (1) this ruling is binding in federal district courts under the Hobbs Act, 28 U.S.C. § 2342(1); and (2) that the plain language of the rule states that a fax offering free goods or services, like the Fax offering a free copy of the PDR e-book, is an "advertisement," and thus required to comply with the TCPA and the FCC regulations. (Pet. App. 39a–40a).

On September 30, 2016, the district court granted PDR's motion to dismiss. First, the Court held that because the statutory definition of "advertisement" is "clear," the "FCC's interpretation of the TCPA is not due 'substantial deference'" under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). (Pet. App. 40a).

Second, the district court held that, "even if the Court were to defer to the FCC's interpretation," the 2006 FCC Rule states that a fax must "promote" free goods or services to be an advertisement, and *promote* has "an explicit commercial nature," which it concluded was lacking in the Fax offering the free PDR e-book, making it not an "advertisement" under the 2006 FCC Rule. (Pet. App. 40a–41a). Plaintiff timely appealed to the Fourth Circuit.

On February 23, 2018, the Fourth Circuit vacated the district court's dismissal. (Pet. App. 18a). The

Fourth Circuit's decision is reported at *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018).

First, the Fourth Circuit held that "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and the district court had "no power to decide whether the FCC rule was entitled to deference." (Pet. App. 8a, 11a). The Fourth Circuit noted that this kind of "jurisdiction-channeling" provision contained in the Hobbs Act is "nothing unique," and joined the Sixth, Seventh, Eighth, and Eleventh Circuits in holding that "[b]y refusing to defer to the FCC rule and applying *Chevron* analysis instead, the [district] court acted beyond the scope of its congressionally granted authority." (*Id.* 8a–9a).

Second, having held that the 2006 FCC Rule was binding, the Fourth Circuit interpreted that rule, holding that the FCC's ruling that faxes offering "free goods or services" are advertisements is "clear and unambiguous," and "if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." (*Id.* 14a). The Fourth Circuit held that "[f]rom a natural reading of the text of the regulation, we get this simple rule: faxes that offer free goods and services are advertisements under the TCPA." (*Id.*) The Fourth Circuit held "[w]e need not 'harmonize' the FCC's rule with the underlying statute, or probe the agency's rationale," and that

"[b]ecause the plain meaning of the regulation is clear, our interpretive task is complete." (*Id.*)

The Fourth Circuit recognized that the FCC's rule treating all faxes offering free goods or services as "advertisements" subject to the TCPA and the FCC rules "may be overinclusive" and could in some cases "bar an organization from faxing offers for truly free goods and services unconnected to any commercial interest," but it held "prophylactic rules are neither uncommon nor unlawful." (*Id.* 15a). A prophylactic rule like the free-goods-or-services rule, the Fourth Circuit held, "cannot, and need not, operate with mathematical precision," and "[t]he mere fact that a regulation operates overbroadly" in some circumstances "does not render it invalid." (*Id.* (quoting *Friedman v. Heckler*, 765 F.2d 383, 388 (2d Cir. 1985)). In any case, the Fourth Circuit held that "given the increasing obsolescence of fax machines, we suspect there will be few occasions where this rule serves to block an entity wishing to offer truly free goods or services from doing so." (*Id.* 15a–16a).

The Fourth Circuit held that "although we do not reach the FCC's intent in enacting the rule," it was "reasonable" to classify all faxes offering free goods or services as "advertisements." (*Id.* 16a). The Fourth Circuit reasoned that "[t]his case illustrates why the FCC may have decided to implement so broad a rule," where Plaintiff's Complaint was dismissed without any discovery, where "few details of PDR Network's business model have emerged," and where "nothing in the record suggests that PDR Network is a charity"

with some non-commercial motive for sending the Fax. (*Id.* 17a).

The Fourth Circuit vacated the judgment and "remand[ed] for further proceedings consistent with this opinion." (*Id.* 18a).

On March 9, 2018, PDR filed a petition for rehearing en banc, which the Fourth Circuit denied without any judge calling for a vote. (*Id.* 45a).

REASONS FOR DENYING THE PETITION

I. Every circuit to address the question has held that a "final order" of the FCC interpreting the TCPA may be reviewed only by the court of appeals in a Hobbs Act proceeding, and there is no circuit split on the issue.

PDR does not argue that the Fourth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court," warranting review under Sup. Ct. R. 10(c). (Pet. at 1–32). To the contrary, PDR cites *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984), where this Court held "[e]xclusive jurisdiction for review of final FCC orders . . . lies in the Court of Appeals" under the Hobbs Act, 28 U.S.C. § 2342(1). (*Id.* at 29). Rather, PDR argues that there is a "circuit split" regarding whether the Hobbs Act requires a district court to follow the FCC's interpretations of the TCPA, or whether a district court can review those interpretations for *Chevron* deference. (*Id.* at 13).

There is no such split. Every circuit court to address this question has held that the FCC's interpretations of the TCPA are binding in district courts, and subject to review only in the court of appeals following the Hobbs Act procedures, and this Court denied certiorari in three of those cases. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539; *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. App'x 444, 459 (6th Cir. 2013), *cert. denied*, 135 S. Ct. 57;[1] *C.E. Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445–50 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933.

PDR asserts that it is not challenging the "validity" of the free-goods-or-services rule, and is instead merely asking this Court to allow the district court to hold that this rule conflicts with the "unambiguous" statute and is, therefore, not entitled to "substantial deference" under *Chevron*. (Pet. at 15). The Fourth Circuit correctly recognized that when a court holds that an agency order is not entitled to *Chevron* deference because it conflicts with an unambiguous statute, it is determining the "validity" of the order. (Pet. App. 20a). That is the same result

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[1] The 2013 *Leyse* decision superseded the Sixth Circuit's prior ruling in the case, which mistakenly ruled that the Hobbs Act did not bar the challenge to the regulation. *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 376 (6th Cir. 2012).

reached by the circuit courts in *Mais*, *Nack*, *Leyse*, and *C.E. Design*.

In *Mais*, the district court granted summary judgment for the plaintiff in a TCPA case, refusing to apply a 1992 FCC order stating that the mere "provision of a cell phone number" constitutes "prior express consent," reasoning that the rule was "inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express *or implied* consent.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013). The district court held "Congress could have written the statute that way, but it didn't," and so "the FCC's contrary construction is not entitled to deference" under *Chevron*. *Id.*

The *Mais* district court insisted it was not violating the Hobbs Act by declining to enforce the FCC's interpretation because "this action's central aim is not to invalidate any [FCC] order," but "to obtain damages for violations of the TCPA, a consumer protection statute." *Id.* at 1237.

The Eleventh Circuit reversed, holding that "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power" in violation of the Hobbs Act. *Mais*, 768 F.3d at 1119. The Eleventh Circuit held it made "no difference" that the validity of the FCC's interpretation arose "in a dispute between private parties," rather than a proceeding with the primary purpose of attacking the ruling. *Id.*

It held the plaintiff was "free to ask the Commission to reconsider its interpretation of 'prior express consent' and to challenge the FCC's response in the court of appeals," but the district court was bound to enforce the ruling, even if it considered it unworthy of *Chevron* deference. *Id.* at 1119–20; *see also Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015) (district courts "may not determine the validity of FCC orders, *including by refusing to enforce an FCC interpretation*") (citing *Mais*, 768 F.3d at1114) (emphasis added).

In *Nack*, the district court entered summary judgment for the defendant in a TCPA case, "interpreting" an FCC rule requiring "opt-out notice" on fax advertisements sent with "prior express invitation or permission" as not applying to faxes sent with express permission, reasoning that "as a whole," the TCPA applies "only to unsolicited faxes," i.e., faxes sent without permission. *Nack v. Walburg*, 2011 WL 310249, at *4–5 (E.D. Mo. Jan. 28, 2011). As in *Mais*, the district court insisted it was not "enjoining, setting aside, annulling, or suspending" the FCC rule in violation of the Hobbs Act, but "interpreting" it in a manner "consistent with the TCPA, and with Congress' and the FCC's stated intent to prevent 'unsolicited' facsimile advertisements." *Id.* at *5–6.

On appeal, the FCC filed an amicus brief arguing that the defendant's "interpretive" challenge to the rule was barred by the Hobbs Act and that, to obtain judicial review of the rule, the defendant must petition the FCC and then (if the petition was denied)

seek review in the court of appeals. *Nack*, 715 F.3d at 686 n.2. The Eighth Circuit agreed with the FCC and reversed, holding that neither the district court nor the Eighth Circuit (in the current posture) had jurisdiction to "interpret" the regulation away as contrary to the statute and that the defendant must first "challenge the validity" of the regulation before the FCC to obtain judicial review. *Id.*

The *Nack* defendant petitioned this Court to review the Eighth Circuit's decision, which was denied. *See* 134 S. Ct. 1539.

The *Nack* defendant also petitioned the FCC, which, after a notice-and-comment period, issued a final order on October 30, 2014, granting in part and denying in part. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 29 FCC Rcd. 13998 (Oct. 30, 2014) ("2014 Order"). Multiple parties (both TCPA defendants and TCPA plaintiffs, some of whom were represented by undersigned counsel, Anderson + Wanca) filed petitions for review from the 2014 Order in the Eighth Circuit and D.C. Circuit under the Hobbs Act, which were transferred and consolidated by the MDL Panel in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043. The D.C. Circuit reviewed the 2014 Order for *Chevron* deference and vacated the 2014 Order, in part. *Id.*; *see also ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (applying *Chevron* in Hobbs Act appeal from 2015 FCC order

interpreting TCPA provisions regarding autodialed voice telephone calls).

In *Leyse*, the district court dismissed a TCPA plaintiff's claim arising out of a telephone call from a local radio station, holding that the FCC issued an order in 2003 exempting such calls from the TCPA's definition of "advertisement," and that the plaintiff's challenge to the validity of that exemption was barred by the Hobbs Act. 545 Fed. App'x at 459. The Sixth Circuit affirmed, holding that "the Hobbs Act deprives the district court below—and this court on appeal—of jurisdiction over the argument that the exemption was invalid or should be set aside," holding, "the Hobbs Act's jurisdictional limitations are equally applicable" regardless whether a party challenges the agency order directly or "indirectly" in a private TCPA action. *Id.* (quoting *C.E. Design*, 606 F.3d at 448).

In *C.E. Design*, the district court granted summary judgment for the defendant in a TCPA action involving fax advertisements, enforcing the FCC's interpretation that faxes sent pursuant to an "established business relationship" or "EBR" were not prohibited and that the plaintiff's argument that the FCC had no authority to create the EBR rule was barred by the Hobbs Act. 606 F.3d at 446. The Seventh Circuit affirmed, holding it made "no difference" that the challenge to the EBR rule arose in a private TCPA action instead of an action with the express purpose of attacking the rule, and that when the plaintiff "argued that the district court should ignore—or in other words, *invalidate*—the FCC's

EBR exemption for purposes of this suit, the Hobbs Act's jurisdictional bar came into play." *Id.* at 448 (emphasis added).[2]

Thus, with the addition of the Fourth Circuit's decision in this case, five circuit courts have now agreed that a district court cannot "ignore—or in other words, *invalidate*" an interpretation of the TCPA contained in a "final order" of the FCC. Under the Hobbs Act, 28 U.S.C. § 2342(1), a final order of the FCC may be reviewed for *Chevron* deference only in a court of appeals on direct appeal from the agency, as was the case in *Bais Yaakov*, 852 F.3d at 1082, and *ACA Int'l*, 885 F.3d 687.

PDR argues that the Second, Third, and Sixth Circuits would have allowed the district court to review the free-goods-or-services rule under *Chevron*. (Pet. at 17–20). None of the cases PDR cites stands for this proposition.

The Second Circuit's decision in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 93–97 (2d Cir. 2017), does not mention the Hobbs Act or *Chevron*. Rather, as discussed in Section II, below, the Second Circuit applied the free-goods-or-services rule without questioning its validity, and merely interpreted it

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[2] PDR appears to rely on *Holtzman v. Turza*, 728 F.3d 682, 687–88 (7th Cir. 2013), as evidence of its alleged circuit split (Pet. at 14), but that decision does not mention the Hobbs Act.

more narrowly than the Fourth Circuit in this case.[3] That interpretative issue—what the 2006 FCC Rule *means*—is unrelated to the "jurisdictional issue" identified in the Petition—whether the rule is subject to judicial review in a district court.

PDR cites two unreported Third Circuit decisions to show its alleged circuit split. In *Manuel v. NRA Grp. LLC*, 722 Fed. App'x 141, 148 (3d Cir. Jan. 12, 2018), the defendant relied on the FCC's interpretation of "automatic telephone dialing system" in the district court, lost on summary judgment, and then argued on appeal that the FCC's interpretation was wrong. The Third Circuit affirmed the summary judgment, holding the defendant waived the argument. *Id.* In *Dominguez v. Yahoo, Inc.*, 629 Fed. App'x 369, 373 (3d Cir. Oct. 23, 2015), the Third Circuit vacated summary judgment for the defendant on the "automatic telephone dialing system" question and remanded for the district court to reconsider in light of an intervening FCC ruling interpreting that term. Neither case stands for the proposition that a district court has jurisdiction to decide whether a final order of the FCC interpreting the TCPA should be accorded *Chevron* deference.

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[3] As discussed in Section II, the result in this case would be the same under the Second Circuit's interpretation of the free-goods-or-services rule in *Boehringer*, where the Fax "relate[s] to" PDR's business and the district court dismissed for failure to state a claim prior to any discovery into whether it was a "pretext."

Finally, PDR argues that the Sixth Circuit would have allowed the district court "to conduct a *Chevron* analysis" of the free-goods-or-services rule based on *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015). (Pet. at 18). *Sandusky* does not mention the Hobbs Act. 788 F.3d at 219–26. Nor did *Sandusky* involve a fax offering "free goods or services," implicating the 2006 FCC Rule. Rather, the fax in that case was sent by a pharmacy-benefits manager to physicians, explaining which medications were on a "formulary," and thus covered by insurance. *Id.* The Sixth Circuit did not hold that any FCC interpretation was not worthy of *Chevron* deference. *Id.* In fact, the Sixth Circuit went on to actually apply the FCC's interpretations, holding the formulary fax was "purely informational" under those interpretations. *Id.*

Finally, PDR makes a policy argument that "[s]tripped of their jurisdiction" to review FCC orders, district courts will be required to apply those orders, even if the district judge believes they conflict with an "unambiguous" statute, a result that PDR argues "undercuts the purpose of our judicial system." (Pet. at 20). PDR ignores that the Hobbs Act does not state that an FCC order can never be subject to judicial review. As the Fourth Circuit recognized, the Hobbs Act merely "channel[s]" review of such orders to the court of appeals, which is "nothing unique." (Pet. App. 8a (quoting *Blitz v. Napolitano*, 700 F.3d 733, 742 (4th Cir. 2012) (noting that agency decisions are "commonly" subject to such provisions and that "final

agency actions are generally reviewed in the courts of appeals")). The subject-matter jurisdiction of the federal district courts is controlled by statute, and the Hobbs Act does not undermine the "purpose of our judicial system," contrary to PDR's suggestion.

In sum, there is no circuit split on the "jurisdictional issue" identified in PDR's Petition, and the Petition should be denied.

II. The difference of interpretation between the Second Circuit and Fourth Circuit regarding the meaning of the free-goods-or-services rule does not warrant this Court's review.

PDR argues that the Fourth Circuit's interpretation of the free-goods-or-services rule creates a circuit split with the Second, Sixth, Ninth, and Eleventh Circuits. (Pet. at 21). Of the supposedly conflicting cases PDR cites, the only one that applies the free-goods-or-services rule is the Second Circuit's decision in *Boehringer*.

In *Boehringer*, the district court interpreted the 2006 FCC Rule to mean that a fax offering free goods or services must actually be a "pretext" to further advertising to be an "advertisement," and dismissed for failure to state a claim. 847 F.3d at 95. The Second Circuit agreed with the district court's interpretation that there must be a "pretext" in fact but nevertheless reversed the dismissal, holding that the free-seminar fax sent to the plaintiff was "plausibly" an advertisement, where the subject of the free seminar (a medical condition) "relate[d] to" the business of the

sender (manufacturing pharmaceuticals, including one in the pipeline but not yet approved, to treat that same medical condition). *Id.* at 96.

The Second Circuit held the defendant could rebut this "presumption" at summary judgment to show that the fax was not in fact a pretext, but only after discovery into, for example, "testimony of the dinner meeting participants," along with "the meeting's agenda, transcript, presentation slides, speaker list, or any internal emails or correspondences discussing the meeting." *Id.* at 97. The Second Circuit ruled the plaintiff should not, however, be required "to plead specific facts alleging that specific products or services would be, or were, promoted at the free seminar," without the benefit of any discovery because that "would impede the purposes of the TCPA," which is a "remedial statute" that "should be construed to benefit consumers." *Id.* (quoting *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013)).

Although the Second Circuit interpreted the 2006 FCC Rule more narrowly in *Boehringer* than the Fourth Circuit in this case, this difference of interpretation does not warrant this Court's review.

First, the result in this case would be the same under the Fourth Circuit's plain-language interpretation or the Second Circuit's narrower interpretation. The Second Circuit would have reversed the district court's dismissal here because, as in *Boehringer*, the Fax promoting the free 2014 e-

Book plainly "relates to [PDR's] business." *Boehringer*, 847 F.3d at 96. The Fax asks recipients to contact "customerservice@pdr.net" for additional information. (Pet. App. 51a). PDR is not a non-profit organization.[4] It is a for-profit enterprise, and the Second Circuit would presume at the pleading stage, as it did in *Boehringer*, that commercial entities do not send offers of free goods and services "for no business purpose." *Boehringer*, 847 F.3d at 95. Because the Fax in this case "relates to" PDR's for-profit business, the dismissal would be reversed under the Second Circuit standard *or* the Fourth Circuit standard, so it is a poor vehicle to resolve the difference of interpretation regarding the scope of the free-goods-or-services rule (even if this difference of interpretation were worthy of certiorari).

Second, the free-goods-or-services rule is rarely implicated in TCPA litigation. There have been only two circuit court decisions (*Boehringer* and the Fourth Circuit's opinion in this case) applying the free-goods-or-services rule in the 12 years since the FCC issued it in 2006, and only a handful of district court cases. *See, e.g.*, *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 492 (W.D. Mich. 2015). Given the "increasing obsolescence of fax machines" noted by the Fourth Circuit, it is unlikely

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[4] Judge Leval's concurrence reasoned that the result might be different for free-goods-or-services faxes sent by "nonprofits." *Boehringer*, 847 F.3d at 102 (Leval, J., concurring).

that there will be many more such cases. (Pet. App. 15a–16a).

In contrast to *Boehringer*, the other cases on which PDR relies for its alleged split in authority regarding the meaning of the 2006 FCC Rule do not involve faxes offering free goods or services, and so they do not create a circuit split as to the meaning of that ruling. The Sixth Circuit's summary-judgment decision in *Sandusky*, 788 F.3d at 223, expressly contrasted the purely informational fax in that case, which merely stated which medications were on a formulary, with faxes offering "free seminars," stating that free-seminar faxes are "likely" advertisements. Thus, the Sixth Circuit would "likely" rule in Plaintiff's favor in this case, and would certainly allow Plaintiff to survive a motion to dismiss for failure to state claim and proceed to discovery and summary judgment, like the plaintiff in *Sandusky*.

The faxes at issue in the Ninth Circuit's unreported decision in *N.B. Indus. v. Wells Fargo & Co.*, 465 Fed. App'x 640 (9th Cir. 2012), contained information about an award and encouraged recipients to apply for the award. It did not discuss or even mention the free-goods-or-services rule, and so it cannot create a conflict with the Fourth Circuit's interpretation of that rule in this case, or the Second Circuit's interpretation of the rule in *Boehringer*.

Finally, PDR cites *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366–67 (11th Cir. 2017). (Pet. at 22). The fax at issue in that

case asked doctors to provide "information to complete an order already made" by their patients. *Id.* The faxes did not offer free goods or services, and the Eleventh Circuit affirmed the dismissal while distinguishing cases where the faxes "encouraged the recipient of the fax to prescribe the drug to patients" or invited doctors to attend a "free seminar" sponsored by the fax sender. *Id.* at 1367. The decision does not cite or discuss the free-goods-or-services rule, and it does not conflict with the Fourth Circuit's decision in this case with respect to the meaning of that rule. *Id.*

In sum, the difference of interpretation between the Fourth Circuit's plain-language reading of the free-goods-or-services rule and the Second Circuit's interpretation that the fax must be a "pretext" in fact would not change the outcome in this case, and the issue does not warrant this Court's review.

III. The Fourth Circuit's ruling does not "prohibit" PDR from sending faxes offering free copies of its e-book, as long as it follows the rules.

PDR complains that the Fourth Circuit's decision that the Fax is an advertisement "effectively bars" or "prohibit[s]" it from offering free copies of the e-book by fax. (Pet. at 30). PDR is mistaken. It is not necessarily unlawful to send fax advertisements. The TCPA merely requires that the fax sender obey a few simple rules.

First, the sender must either (1) obtain the recipient's "prior express invitation or permission" to send fax advertisements *or* (2) take care to send faxes

only to recipients with whom the sender has an "established business relationship" (or "EBR"). 47 U.S.C. § 227(a)(5); *id.* § 227(b)(1)(C).

Second, if the sender seeks to use the EBR safe harbor, it must obtain the recipient's fax number through the recipient's "voluntary communication" of the number to the sender, or by the recipient's voluntary inclusion of the number in a publicly available directory. 47 U.S.C. § 227(b)(1)(C)(ii).

Third, the fax sender must include an "opt-out notice" on the fax clearly and conspicuously disclosing to the recipient how to stop future faxes meeting the requirements in the statute and the implementing regulations. 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iii).

A sophisticated entity like PDR should have no difficulty complying with these requirements. The Fourth Circuit's ruling does not prevent PDR from offering free copies of its e-books via facsimile, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 17-1705

In The Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioners PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively, "PDR") respectfully submit this reply brief addressed to new points raised in the Brief in Opposition ("Resp. Br.") to their petition for a Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

Do courts possess the inalienable jurisdiction to independently analyze statutes and determine the proper level of deference afforded interpretive agency guidance under *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)—as PDR asserts? Or should this core jurisdiction be stripped away, such that courts must automatically "defer" to such guidance if said agency happens to be identified in the Hobbs Act, 28 U.S.C. § 2342—as Respondent claims? Review is needed to clarify this complex question that has spawned numerous circuit splits, confounded jurists, and permitted agency guidance to impermissibly usurp the judiciary's "province and duty" to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed 60 (1803).

In opposing PDR's petition for certiorari, Respondent confirms exactly why review is needed.

First, Respondent claims this Court should deny certiorari because the Fourth Circuit's split panel decision was just the next in a line of circuit opinions holding the Hobbs Act precludes district courts from determining whether FCC orders are entitled to deference. In so arguing, Respondent ignores a critical distinction: each prior opinion involved a prohibited "facial challenge" to the "validity" of the

agency order. But there was no such challenge to the "validity" of the 2006 FCC Rule here. Circuit Judge Stephanie D. Thacker aptly characterized such authority as "inapposite" or "distinguishable" in her dissent. App. 23a-24a. Yet Respondent persists in wrongly claiming this case is "nothing unique."

Whether the Hobbs Act trumps *Chevron*—absent a challenge to the "validity" of an agency order—is a "unique" and substantial question of law. If the Fourth Circuit's ruling is allowed to stand, the Hobbs Act will be expanded beyond the parameters Congress intended. And the practical implications reach far beyond this dispute concerning the FCC interpreting the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. A ruling from this Court will dictate whether *all* lower courts are "precluded" from exercising their jurisdiction to independently assess Congress's meaning under *Chevron*, and should automatically "defer" to guidance issued by any of the numerous agencies identified in the Hobbs Act. 28 U.S.C. § 2342(1)-(7).

Second, by not raising the issue in its brief, Respondent has waived any argument concerning the Fourth Circuit improperly erasing the necessary "commercial nexus" to a firm's business for faxes promoting "free" offerings to be considered "advertisements." *See* Sup. Ct. R. 15.2.

Third, there is a profound circuit split concerning the scope of the 2006 FCC Rule. While Respondent tries to explain away this split between the Fourth and Second circuits as a "minor difference of interpretation," the reality is these circuits are diametrically opposed. The Second Circuit in *Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92 (2d Cir. 2017),

expressly rejected the Fourth Circuit's "*per se* rule" in favor of a "rebuttable presumption" that a fax offering free goods and services is a "pretext" for a commercial promotion or sale. On remand, this "minor difference" proved dispositive—the presumption *was* rebutted, and the case dismissed. Under the Fourth Circuit's "*per se* rule," PDR (and others) would instead be deprived of the same opportunity to prove the absence of a "pretext."

Based on the number of TCPA fax cases filed since the FCC issued its guidance; the growing number of cases concerning the 2006 FCC Rule; and the impracticalities of PDR (and others) obtaining "judicial review" or other relief via a Hobbs Act proceeding; a unified answer can only come from this high Court.

I. THE JURISDICTIONAL QUESTION IN THIS CASE IMPACTS EVERY COURT IN THE NATION, AND IS ALONE SUFFICIENT TO WARRANT REVIEW

PDR identified three splits caused, or exacerbated, by the Fourth Circuit's ruling. Pet. Br. at 13-28. While two of these splits relate to the TCPA or certain fax communications, the jurisdictional question implicates how all courts will treat innumerable orders from multiple agencies.

A. There Is A Circuit Split Concerning The Interplay Between The Hobbs Act And *Chevron* Deference When The "Validity" Of An Agency Order Has Not Been Challenged.

Respondent claims there is "no circuit split" on this jurisdictional question because "[e]very circuit" to address it has held a final order of the FCC

interpreting the TCPA may be reviewed only by the court of appeals in a Hobbs Act proceeding. Resp. Br. at 7. Respondent then claims PDR is "asking this Court to allow the district court to hold that this rule *conflicts with* the 'unambiguous' statute and is, therefore, not entitled to 'substantial deference'[.]" *Id.* (emphasis added). Respondent is wrong on both accounts, and has misconstrued PDR's position.

1. The Sixth Circuit could not have been clearer when it noted the existence of a circuit split on this precise question:

> There is a circuit split regarding whether to defer to the Commission's explanation of its definition [of the term 'advertisement.']

Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc., 788 F.3d 218, 223 (6th Cir. 2015) (citations omitted).

Respondent next turns a blind eye to a critical distinction: while the cases it relied upon all involved prohibited "facial challenges" to the agency order, Resp. Br. at 7-12, *there was no such challenge to the 2006 FCC Rule here.* Pet. Br. at 17. Judge Thacker, in her dissent, addressed this discrepancy—observing how PDR had *not* argued the 2006 FCC Rule was contrary to the "plain language" of the TCPA. *Id.* Instead, the District Court "assumed" the 2006 FCC Rule "was valid" and "harmonized" it with the TCPA to hold the Fax was not an "advertisement." App. 21a, 24a, 41a. This, in turn, avoided any concern over: (i) a challenge to the order's "validity"; and (ii) whether not automatically deferring somehow meant the District Court disagreed with, or ignored, the FCC's guidance. *Id.*

This case is, accordingly, "unique" for this reason. Because there was no challenge to the 2006 FCC Order's "validity," the Fourth Circuit should have allowed the District Court to conduct a "traditional" *Chevron* analysis. Pet. Br. at 11, 17, 20. If permitted to stand, the Fourth Circuit's imprudent ruling would mark the first time a district court was so "precluded" under the Hobbs Act absent such a challenge. Merely by invoking the Hobbs Act—and alleging an order's "validity" is being challenged, even when it is not—litigants could unilaterally hamstring the judiciary's role in analyzing statues.

2. Recognizing the threat *Sandusky* represents, Respondent attempts to minimize its impact by claiming "*Sandusky* did not mention the Hobbs Act." Resp. Br. at 14. But that is precisely PDR's point.

By reaching the merits, the Sixth Circuit did not deem the Hobbs Act a jurisdictional bar to independently analyze the TCPA. Rather, the Sixth Circuit considered whether the term "advertisement" was ambiguous under *Chevron*, and assessed the level of deference afforded the FCC's guidance, holding: "where our 'construction follows from the unambiguous terms of the statute'—as it does here—we do not defer to the agency's interpretation." 788 F.3d at 223.[1] *See also Satterfield v. Simon &*

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[1] Respondent claims *Sandusky* did not "involve a fax offering 'free goods or services,' implicating the 2006 FCC Rule." Resp. Br. at 14. But the 2006 FCC Rule was unquestionably "implicat[ed]." *Sandusky* involved two faxes discussing a formulary of medications that defendant Medco, like PDR here, neither manufactured nor sold. 788 F.3d 224. In determining if these faxes constituted "advertisements," *Sandusky* cited the same section of the 2006 FCC Rule at issue here—*twice*. 788 F.3d at 223 (noting the FCC issued regulations concerning the definition of an "advertisement," and then "expound[ed]" on

Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009) (because the term "automatic telephone dialing system" in the TCPA was "clear and unambiguous," court conducted a *Chevron* analysis of FCC's 2003 interpretation with no mention of the Hobbs Act).

Boehringer provides an even more decisive example. After noting the inconsistent manner[2] in which the Fourth Circuit treated *Sandusky* and *Boehringer*, Pet. Br. at 18 n.5, Judge Thacker observed how, in *Boehringer*, "[t]here was no facial challenge to the 2006 FCC Rule," and "the district court did not determine that the TCPA and the 2006 FCC Rule were in conflict." App. 22a. Judge Thacker also observed that while the plaintiff Physicians Healthsource argued the district court violated the Hobbs Act because it "refused to apply the plain language of the [2006 FCC R]ule," the "*Second Circuit did not address this argument and instead addressed the merits.*" *Id.* (emphasis added).

Twice in the last five months this Court has reaffirmed that deference to an agency "is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018). This Court should grant certiorari to preserve this doctrine from collateral attack based on an agency's mere inclusion in the Hobbs Act.

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that definition via the 2006 FCC Rule); *id.* at 225 (referencing "the free-seminar example" from the 2006 FCC Rule).

[2] Judge Thacker called out the majority for improvidently deeming *Sandusky* as not "persuasive," while considering Judge Leval's concurrence in *Boehringer* to be "persuasive," despite the fact neither addressed the Hobbs Act. App. 22a.

3. Contrary to Respondent's claim, Resp. Br. at 7, PDR has never argued the District Court should "ignore," "invalidate" or hold the 2006 FCC Rule "conflicts" with the TCPA. Pet. Br. at 9-10. Rather, as Judge Thacker observed, "[PDR] merely argued for a specific interpretation of the 2006 FCC Rule, and [Respondent] argued for a different interpretation." App. 24a. Respondent's attempt to distort PDR's argument—and Judge Thacker's dissent[3]—is not well-taken.

II. RESPONDENT CONCEDES THAT A CIRCUIT SPLIT EXISTS REGARDING WHETHER A "COMMERCIAL NEXUS" IS REQUIRED FOR TCPA LIABILITY

PDR detailed how the Fourth Circuit's holding—which erased the requirement that a fax promoting free goods or services have a "commercial aim"—was erroneous; conflicted with the Second, Sixth, Ninth and Eleventh Circuits; and was unique in the national jurisprudence. Pet. Br. at 21-23. In response, Respondent argues only that these TCPA faxes cases "did not appl[y]" the 2006 FCC Rule. Resp. Br. at 15, 18-19.

Setting this artificial distinction aside, the Second Circuit—which *did* apply the 2006 FCC Rule—specifically held: "[t]here must be a

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[3] What the dissent actually discussed is how safeguards exist to ensure courts do not end-run around the Hobbs Act. For example, invalidation can occur at *Chevron* step one if a court finds "the agency's construction is in conflict with the unambiguous statutory language." App 20a. Again, that did not happen here. Pet. Br. at 15. Courts can also accept an order as "valid" and decide if it applies without running afoul of the Hobbs Act. *Id.* at 14-15, 19 n.6.

commercial nexus to a firm's business," and "we agree that a fax must have a commercial purpose." *Boehringer,* 847 F.3d at 93, 95-96. By failing to address this clear error of law, and circuit split[4], Respondent concedes both points. Sup. Ct. R. 15.2.

III. THERE IS A CIRCUIT SPLIT AS TO THE MEANING OF THE 2006 FCC RULE THAT WARRANTS THIS COURT'S REVIEW

The Fourth Circuit's ruling and *Boehringer* are incongruous. Despite each panel interpreting the *exact same provision* of the 2006 FCC Rule, the Fourth Circuit held a fax offering free goods and services was "*per se*" an "advertisement." Pet. Br. at 23. But the Second Circuit rejected this "*per se* rule" in favor of a "rebuttable presumption" that such a fax is a pretext or prelude to a commercial promotion or sale offer. *Id.* This legal distinction proved dispositive in *Boehringer* on remand. *Id.*

Respondent claims this mere "difference of interpretation" does not warrant review because the result "would have been the same under either ruling." Resp. Br. at 16-17. Respondent is mistaken.

Respondent's speculation that the *Boehringer* court "would have reversed the district court's dismissal" is meritless. *Id.* at 16. To reach this conclusion, Respondent misinterprets the question in *Boehringer* as solely based on whether the fax broadly "relates to [the sender's] business." *Id.* at 17.

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[4] *Mauthe v. Optum, Inc.*, 2018 U.S. Dist. LEXIS 125796, at *9 n.2 (E.D. Pa. July 27, 2018) ("There is disagreement in the federal courts regarding the scope of rule. Specifically, some courts [*Boehringer*] require plaintiffs to still prove that the fax has a 'commercial nexus,' whereas others [*Carlton*] have held that it is a de facto rule.") (citations omitted).

But this is not the test to determine if a fax is an "advertisement."[5] As Judge Thacker observed, there must be a "plausible" conclusion that the subject fax had "the commercial purpose of promoting those products or services." App. 30a-31a.

And even assuming *arguendo* that the *Sandusky* or *Boehringer* courts would have reversed the District Court, Resp. Br. at 18, the ensuing question is what that reversal would entail. Under either case, PDR could "rebut" the presumption the Fax is a pretext for an "advertisement" by "proceeding to discovery." *Id.* Under the Fourth Circuit's "*per se* rule," despite Respondent conceding: (i) the *Physicians' Desk Reference* is an "informational resource"; (ii) it is "free to recipients"; and (iii) PDR "does not sell the reference or sell anything in the reference," App. 35a, the Fax has been improperly branded an "advertisement."[6]

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[5] *Mauthe*, 2018 U.S. Dist. LEXIS 125796, at *14-15 ("plaintiff here argues that whenever a business sends a fax to 'further its own economic interests' the fax is an 'unsolicited advertisement' under *Carlton*. This reading of *Carlton* is plainly incorrect.").

[6] The Fourth Circuit found the District Court's apprehension about the lack of a "commercial" nexus between PDR's business and the Fax unwarranted because PDR "receive[d] money from pharmaceutical companies whose drugs are listed in the *Physicians' Desk Reference*." App. 17a. It was thus *possible* "the amount of money [PDR] receives turns on how many copies . . . it distributes." *Id.* And it was also *possible* PDR was incentivized to distribute e-books, and was acting to "further its own economic interests," rather than provide a free service. *Id.* The irony, however, is under the Fourth Circuit's draconian "*per se* rule," PDR's opportunity to rebut such erroneous speculation ends at the pleading stage.

IV. THIS APPEAL HAS IMMENSE PRACTICAL SIGNIFICANCE BEYOND THIS DISPUTE

The outcome of this appeal will help guide future *Chevron* analyses, TCPA litigations, and any other statutory dispute for which an agency identified in the Hobbs Act has issued interpretive guidance.

1. Respondent claims the fax machine's purported "obsolescence" makes it "unlikely" there will be "many more" cases involving the 2006 FCC Rule. Resp. Br. at 17-18. This is demonstrably false. Both the Sixth and D.C. Circuits have observed the fax machine "is not extinct" and "lives on." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1079 (D.C. Cir. 2017) (Kavanaugh, J.); *Sandusky*, 788 F.3d at 220. Criticizing the specific technology—while ignoring the larger legal implications—is shortsighted.[7]

Regardless, the number of TCPA *cases* involving fax "advertisements" has never been higher. Since May 3, 2006—the date the 2006 FCC Order was issued—there have been 1,342 federal court opinions and 240 state court opinions involving either fax advertisements or discussing this aspect of the TCPA.[8] Of those, twenty-seven federal cases spread across nine circuits have cited the 2006 FCC Order;

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[7] *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (TCPA case involving text messages provided vehicle to consider standing, sovereign immunity and mootness); *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012) (TCPA case involving auto-dialed calls provided vehicle to decide concurrent jurisdiction of federal/state courts).

[8] Respondent's counsel has itself been involved in no less than 160 such cases during this same period, including twenty-three cases in the last two years, and two in the last five months.

thus, it can hardly be said this order is "rarely implicated in TCPA litigation." Resp. Br. at 17.

2. Finally, Respondent claims the Hobbs Act does not preclude an FCC order from being subject to "judicial review." Resp. Br. at 14. The Hobbs Act does not supply a viable—or practical—solution.

Under the Hobbs Act, a party who participated in the administrative proceedings must challenge the agency's rule within 60 days of its entry. 28 U.S.C. § 2344. A party that did not participate lacks standing to do so. *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1247 (11th Cir. 2006), *modified on other grounds on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006). Once a rule has been promulgated, a party—including a party that did not participate—has 30 days to petition the agency for reconsideration. 47 U.S.C. § 405(a).

Here, PDR's time to seek reconsideration of the 2006 FCC Rule expired nine years *before* this case. Were PDR to seek administrative relief via a *new* petition for a declaratory ruling from the FCC, there is no guarantee when—*or if*—the FCC would rule. 47 C.F.R. § 1.2. And even if the FCC were to rule, the process of petitioning for, receiving, and seeking "judicial review" via a Hobbs Act proceeding—and subsequent appeal—could take well over a decade.[9]

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[9] *See, e.g., Bais Yaakov*, 852 F.3d 1078, *cert. denied*, 138 S. Ct. 1043 (2018) (twelve years from issuance of FCC order until judicial review concluded); *Nack v. Walburg*, 2011 U.S. Dist. LEXIS 8266 (E.D. Mo. Jan. 28, 2011), *remanded*, 715 F.3d 680 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539 (2014) (eight years from issuance of FCC order until judicial review concluded); *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (three years).

CONCLUSION

The petition for a writ of certiorari should be granted.

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SEPTEMBER 11, 2018

No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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January 8, 2019

QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC. Each Petitioner belongs to a corporate family of entities dedicated to delivering health knowledge products and services that support drug prescribing decisions and patient adherence to medication regimes to improve health. PDR Network, LLC, and PDR Distribution, LLC, are wholly owned subsidiaries of PDR, LLC. PDR Equity, LLC, is a wholly owned subsidiary of PSKW Holdings, LLC. No publicly held corporation holds 10% or more of any petitioner's stock.

Respondent Carlton & Harris Chiropractic, Inc., is a chiropractic medical office located in West Virginia that delivers healthcare services.

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BRIEF FOR PETITIONERS

Petitioners PDR Network, LLC, et al. (collectively, "PDR"), respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–31a) is reported at 883 F.3d 459. The unpublished opinion and order of the district court (Pet. App. 32a–43a) are available at 2016 WL 5799301.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2018. Petitioner timely sought rehearing en banc, which was denied on March 23, 2018. The petition for a writ of certiorari was filed on June 21, 2018, and granted on November 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions principally involved are the Hobbs Act (28 U.S.C. §§ 2341–2351), Section 10(b) of the Administrative Procedure Act (5 U.S.C. § 703), and the provision of the Telephone Consumer Protection Act that defines the term "unsolicited advertisement" (47 U.S.C. § 227(a)(5)). The pertinent text of these provisions is set out in the appendix to the brief.

STATEMENT OF THE CASE

PDR's position in this case proceeds from a simple and natural premise. When Congress vests an Article III court with power to impose liability for an alleged statutory violation, Congress ordinarily intends also to

vest that court with the power to decide the meaning of the statute at issue.

The decision below proceeds from the opposite premise. It takes the Hobbs Act (the "Act")—an ordinary agency review statute, which even the Fourth Circuit recognized to be "nothing unique," Pet. App. 8a (internal quotation marks omitted)—and reads it to "specifically strip[] jurisdiction from the district courts" to consider dispositive statutory questions because an agency has previously weighed in on those questions. Pet. App. 8a. The court of appeals thus treated the Hobbs Act as though it gives agencies, rather than courts, the final word as to what federal law means.

The Fourth Circuit was wrong to ascribe such revolutionary meaning to a statute as ordinary as the Hobbs Act. That statute is one of many that establish what the Administrative Procedure Act ("APA") calls "special statutory review proceeding[s]." 5 U.S.C. § 703. There is variety across these provisions, but in broad strokes they serve to route judicial actions seeking equitable or declaratory relief from unlawful agency action to specified courts. They do not go the further step, however, of prohibiting all other courts from considering whether to apply an agency's interpretation of a statute in cases that do not seek relief against the government and that are properly before those courts.

Correctly construed, the Hobbs Act has a limited and sensible reach. Where applicable, it gives the courts of appeals exclusive jurisdiction over just one kind of proceeding: suits against the United States brought to obtain injunctive or declaratory relief from agency action. No other kind of proceeding is mentioned in the Hobbs Act. There is thus no reason to read the Act to give the courts of appeals a monopoly over all judicial

review of agency orders, even where no relief is sought against any federal agency, officer, or employee.

Moreover, a host of considerations strongly counsel against the Fourth Circuit's radical reading. Under that reading, the Hobbs Act would conflict with the presumption in favor of the reviewability of agency action, with a key provision of the APA embodying that presumption, *see* 5 U.S.C. § 703, and with constitutional avoidance principles, given the grave due process and separation of powers questions raised by the Fourth Circuit's construction. The better course, by far, is to treat the Hobbs Act as the conventional agency review statute that it is, and thus to hold that the Act merely confers original jurisdiction over certain equitable or declaratory actions against the government on the courts of appeals. It says nothing about other actions, like this one, properly brought in district court, and therefore does not interfere with the district court's authority, pursuant to its own "original jurisdiction [over] all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C § 1331, to decide the legal questions at the core of those actions.

A. Statutory And Regulatory Background

1. The Telephone Consumer Protection Act

The Telephone Consumer Protection Act of 1991 ("TCPA") prohibits the use of "any telephone facsimile machine" to "send an unsolicited advertisement" to another "telephone facsimile machine." Pub. L. No. 102-243, sec. 3(a), § 227(b)(1)(C), 105 Stat. 2394, 2396 (codified as amended at 47 U.S.C. § 227(b)(1)(C)). The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is

transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). The TCPA creates a private right of action for "violation[s] of [the TCPA] or the regulations prescribed [thereunder]." *Id.* § 227(b)(3). In these private enforcement suits, each individual TCPA infraction may be punished by a $500 per violation penalty, which may be trebled if the violation was made "willfully or knowingly." *Id.* As many courts have observed, this statutory damages provision has made the TCPA a magnet for litigation. Many businesses that "have never heard of this obscure statute" face "very heavy penalties" for violations. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 916 (7th Cir. 2011); *see also Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) ("We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy ...."); *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8073 (2015) (Commissioner Pai, dissenting) ("[T]he TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014."), *vacated in part, ACA Int'l v. FCC*, 885 F.3d 687, 693 (D.C. Cir. 2018).

The TCPA directs the Federal Communications Commission ("FCC" or "Commission") to "prescribe regulations to implement the requirements" of the statute. 47 U.S.C. § 227(b)(2). In 2006, pursuant to this responsibility, the Commission issued the order at the center of this case. For the most part, the order amended certain rules in light of changes to the TCPA made by the Junk Fax Prevention Act of 2005. *See* Pub.

L. No. 109-21, 119 Stat. 359 (codified as amended at 47 U.S.C. § 227). Those amendments are not relevant here. What is relevant is that in issuing the order, the Commission also "t[ook] the opportunity to address certain issues raised in petitions for reconsideration" of a 2003 FCC order concerning the TCPA's facsimile advertising rules. *See Report and Order and Third Order on Reconsideration: Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3788 (2006) ("2006 Order").[1] Those issues included the proper application of the TCPA's definition of "unsolicited advertisement" to "offers for free goods and services and informational messages."

With respect to that subject, the 2006 Order states that unsolicited "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *Id.* at 3814. The order observes that, "[i]n many instances, 'free' seminars serve as a pretext to advertise commercial products and services," and "free" publications likewise "are often part of an overall marketing campaign to sell property, goods, or services." *Id.*

At the same time, the 2006 Order states that "facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules," and that "[a]n incidental adver-

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[1] A "summary" of the 2006 Order was subsequently published in the Federal Register. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006). The Fourth Circuit referred to that summary as the "2006 FCC Rule." Pet. App. 5a.

tisement contained in such a newsletter does not convert the entire communication into an advertisement." *Id.* The order then sets forth a number of factors the Commission "will consider" in determining whether an advertisement is incidental to an "informational communication." *Id.* at 3814 n.187. Importantly, the order provides that the Commission "will review such newsletters on a *case-by-case* basis" to determine if their "primary purpose is informational, rather than to promote commercial products." *Id.* at 3814–15 (emphasis added).

2. The Hobbs Act

The Administrative Orders Review Act, better known as the Hobbs Act, establishes a mechanism for direct judicial review of certain final orders from several agencies, including the FCC. Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as amended at 28 U.S.C. §§ 2341–2351); *see generally* 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3941 (3d ed. 1998) (noting that the Hobbs Act is part of "a startling array of specific statutory provisions" that "establish court of appeals jurisdiction to review actions of agencies").

The Act outlines how a proceeding for direct review must be brought and conducted, and specifies what relief may be granted to a prevailing party. To obtain direct review, a "party aggrieved" by an order must petition within 60 days of the order's entry. 28 U.S.C. § 2344. "The action shall be against the United States," *id.*, and must be brought in the "judicial circuit in which the petitioner resides or has its principal office," or in the D.C. Circuit, *id.* § 2343. The record generally comprises any "proceedings before the agency," *id.* § 2347(a), and the court of appeals "has exclusive jurisdiction to make and enter . . . a judg-

ment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency," *id.* § 2349(a).

Section 2342 of the Act explains which agency actions are subject to direct review. As to the FCC, it provides that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47."[2] *Id.* § 2342. Section 402(a), in turn, provides that, with certain exceptions not relevant here, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission ... shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28," *i.e.*, the Hobbs Act. 47 U.S.C. § 402(a).

B. Factual Background And Proceedings Below

PDR is the publisher of the *Physicians' Desk Reference*, the nation's leading compendium of prescribing information for prescription drugs. Pet. App. 3a. As the Food and Drug Administration has observed, the *Physician's Desk Reference* compiles and reprints the "drug labeling, or package insert, that accompanies drug products," which the FDA regards as "the most complete single source of information on the drug."[3] The

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[2] The Hobbs Act also applies to certain actions of the Secretary of Agriculture, Secretary of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission, and Secretary of Housing and Urban Development, and to all final orders issued by the Surface Transportation Board. *See* 28 U.S.C. § 2342(2)–(7); 42 U.S.C. § 5841(f) (transferring regulatory authority from Atomic Energy Commission to Nuclear Regulatory Commission).

[3] *See Frequently Asked Questions About Drugs*, U.S. Food & Drug Admin., https://www.fda.gov/aboutfda/centersoffices/office

Physicians' Desk Reference has been aptly described as "a publication generally available to all doctors and utilized by drug companies to inform the medical profession of the characteristics, uses and side effects of drugs." *Schenebeck v. Sterling Drug, Inc.*, 423 F.2d 919, 921 (8th Cir. 1970); *see also, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 478 (2013) (citing *Physicians' Desk Reference* as a source describing a rare but serious side effect of nonsteroidal anti-inflammatory pain relievers); *Nelson v. Sandoz Pharm. Corp.*, 288 F.3d 954, 959 (7th Cir. 2002) (*Physicians' Desk Reference* "provides information concerning the uses and side effects of numerous prescription drugs"). Publication of this information in the *Physicians' Desk Reference* helps ensure that healthcare professionals are adequately warned of possible side effects and can make informed prescribing decisions for their patients. *See, e.g.*, *Guevara v. Dorsey Labs.*, 845 F.2d 364, 366 (1st Cir. 1988) (noting that inclusion of warning in *Physicians' Desk Reference* meant that defendant "unquestionably did warn of [a particular] hazard"); *Hall v. Merck, Sharp & Dohme*, 774 F. Supp. 604, 606 (D. Kan. 1991) (holding that information in *Physicians' Desk Reference* was sufficient to warn physician of side effects for purposes of learned intermediary doctrine); *see also United States v. Azmat*, 805 F.3d 1018, 1042 (11th Cir. 2015) (affirming denial of *Daubert* motion where challenged medical expert based his opinions regarding "the prescribing practices of other physicians" on the *Physicians' Desk Reference*).

PDR distributes the *Physicians' Desk Reference* to doctors and other healthcare professionals without charge. Pet. App. 35a. It sells neither the book nor any pharmaceutical products listed therein. Pet. App. 35a.

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ofmedicalproductsandtobacco/cder/ucm082690.htm (last updated Nov. 27, 2015).

PDR's revenue comes from fees pharmaceutical companies pay to include their drug labels in the compendium. Pet. App. 3a.

In 2013, PDR launched a digital "eBook" version of the *Physicians' Desk Reference*. To announce the eBook's availability, PDR sent a fax to healthcare professionals. One of the parties to receive the fax was respondent Carlton & Harris Chiropractic, Inc., a West Virginia healthcare practice. Pet. App. 3a. The one-page fax was addressed to the recipient's "Practice Manager," and the subject line read "FREE 2014 *Physicians' Desk Reference* eBook – Reserve Now." Pet. App. 3a. The fax invited the recipient to visit PDR's website and reserve an eBook copy of the coming year's edition of the *Physicians' Desk Reference*. Pet. App. 3a. The fax noted that the eBook contained the "[s]ame trusted, FDA-approved full prescribing information" as the physical version, but in a "convenient digital format." Pet. App. 3a–4a (alteration in original). At the bottom, the fax stated, "You are receiving this fax because you are a member of the PDR Network," and provided instructions on how the recipient could "opt-out of delivery." Pet. App. 51a (reproduction of fax); *see* Pet. App. 4a.

In November 2014, Carlton & Harris filed a putative class action, claiming that PDR's fax was an "unsolicited advertisement" sent in violation of the TCPA. Pet. App. 4a; Pet. App. 33a. PDR moved to dismiss, arguing that its December 2013 fax was not an "unsolicited advertisement" under the TCPA. Pet. App. 36a. PDR further contended that the FCC's interpretation of "unsolicited advertisement" in the 2006 Order was consistent with PDR's understanding of the statute. Pet. App. 39a.

The district court agreed with PDR and dismissed the case. Examining principally the text of the TCPA,

the court explained that the TCPA defines "unsolicited advertisement" as "'any material advertising the commercial availability or quality of any property, goods, or services,'" Pet. App. 36a–37a (quoting 47 U.S.C. § 227(b)(1)(C), (a)(5)), and that PDR's fax did not fit this definition because the *Physicians' Desk Reference* is not "bought or sold," and thus is not "commercially available," Pet. App. 36a–37a (internal quotation marks omitted). The district court also noted that PDR's fax did not have a "commercial aim" because it only "offers, for free, a reference book" that PDR does not sell, containing "information about prescription drugs" that PDR also does not sell. Pet. App. 38a. Thus, the court held, the "essential commercial element of an advertisement [wa]s missing from the fax." Pet. App. 38a.

The district court then addressed Carlton & Harris's argument that the Commission's 2006 Order conclusively resolved the dispute in its favor. First, the district court held that the Hobbs Act did not require it to adopt the 2006 Order because neither party had "challenged the validity" of the 2006 Order, Pet. App. 39a—PDR, after all, argued that the 2006 Order, properly construed, *supported* its contention that its conduct complied with the TCPA, *see* Pet. App. 24a; *see also* Defendants' Memorandum of Law in Support of Motion to Dismiss at 10–12, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-cv-14887 (S.D. W. Va. Feb. 5, 2016), ECF No. 19. Second, the district court determined that the TCPA's definition of "unsolicited advertisement" was "unambiguous," and that the court accordingly was bound to apply that definition. Pet. App. 39a–40a. Finally, the court held that the interpretation set forth in the 2006 Order did not support Carlton & Harris's claim, but instead was "harmon[ious]" with the unambiguous meaning of the

TCPA. Pet. App. 41a. As the court explained, the 2006 Order, "careful[ly] read[]," encompasses only offers of a "commercial nature," Pet. App. 40a, such as offers for free goods or services that are "'part of an overall marketing campaign to sell property, goods, or services'" or are a "pretext for a commercial transaction that will inevitably follow the fax," Pet. App. 41a (quoting 21 FCC Rcd. at 3814). The court recognized that reading "the FCC's guidance as a blanket ban on any fax that offers a free good or service without any commercial aspects ... strips essential meaning from the TCPA." Pet. App. 42a–43a. Because PDR's fax had no such commercial aspects, the district court held that it was not an "unsolicited advertisement" under the 2006 Order, properly construed. Pet. App. 42a.

In a divided decision, the Fourth Circuit reversed. It first held that the district court erred by relying on the text of the TCPA to determine whether PDR's fax was an "unsolicited advertisement." According to the Fourth Circuit, the Hobbs Act "precluded the district court" from taking this step—and likewise barred PDR from raising any defense based on the language of the statute—by conferring on the courts of appeal "'exclusive jurisdiction' to 'enjoin, set aside, suspend (in whole or in part), or to determine the validity of' the orders to which it applies." Pet. App. 7a (quoting 28 U.S.C. § 2342(1)). The Fourth Circuit read this language to "strip[]" the district court of "jurisdiction" to consider whether the interpretation of the TCPA offered by the FCC in the 2006 Order was valid, and instead to require the district court to "adopt the 2006 FCC Rule." Pet. App. 8a. The Fourth Circuit held that it made no difference that the "district court did not specifically invalidate the 2006 FCC Rule." Pet. App. 10a.

Turning to the proper interpretation of the 2006 Order, the Fourth Circuit then rejected the district court's view—as informed by the TCPA's text, Pet. App. 42a—that the order requires a fax to have a "commercial aim" to qualify as an "unsolicited advertisement." Pet. App. 13a. Instead, the Fourth Circuit held that the "plain meaning" of the 2006 Order is that *all* faxes that "promote goods or services even at no cost . . . are unsolicited advertisements under the TCPA's definition." Pet App. 13a–14a (internal quotation marks omitted). According to the Fourth Circuit, once that plain meaning was ascertained, a court's "interpretive task [was] complete," and there was "no need" to "'harmonize' the FCC's rule with the underlying statute, or probe the agency's rationale." Pet. App. 14a. The Fourth Circuit recognized that the categorical rule it divined from the 2006 Order is "broad" and "prophylactic," and could reach "offers for truly free goods and services unconnected to any commercial interest." Pet. App. 15a, 17a. But it concluded that the reading was nonetheless a "reasonable one" because a "per se rule" prohibiting "all unsolicited offers for free goods or services" "advances the purpose of the underlying statute." Pet. App. 15–16a. The court did not explain why it thought it appropriate to consult the TCPA's "purpose," but not its text.

Judge Thacker dissented. She agreed with PDR that, read as a whole, the 2006 Order interprets the TCPA to mean that "a fax with a free offering must necessarily include a commercial aim to qualify as an 'advertisement' under the TCPA." Pet. App. 29a. Judge Thacker concluded that Carlton & Harris's complaint failed to plausibly allege such an aim. Pet. App. 30a–31a.

PDR timely petitioned this Court for review, and the Court granted the petition limited to the question of

whether the Hobbs Act required the district court in this case to accept the FCC's interpretation of the TCPA.

SUMMARY OF ARGUMENT

In the proceedings below, the district court held that the TCPA does not prohibit PDR's fax and that reading the FCC's 2006 Order to do so would violate the TCPA's terms. The Fourth Circuit reversed, not because it construed the TCPA differently—it expressly declined to consider the statute's language—but because it construed the Hobbs Act to require the district court to enforce the FCC's interpretation of the TCPA, regardless of whether that interpretation is consistent with the text of the statute. That decision is wrong for several independent reasons.

I.A. The Fourth Circuit misconstrued the Hobbs Act, giving the Act a much broader preclusive sweep than its text warrants. Properly read, the Hobbs Act vests courts of appeals with exclusive jurisdiction only over proceedings for *direct* review, in which a party seeks injunctive or declaratory relief against the United States from an allegedly unlawful agency action. The Hobbs Act thus does not affect the authority of district courts to fully adjudicate cases in which the United States is not a party and no injunctive or declaratory relief against it is sought.

The text and structure of the Hobbs Act make its limited jurisdictional scope clear. Section 2342 provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final orders covered by the Act. 28 U.S.C. § 2342. The terms "enjoin," "set aside," and "suspend" all refer to a specific type of relief—injunctive. The *noscitur a sociis* canon thus

counsels that the neighboring term, "determine the validity of," likewise refers to a specific type of relief—declaratory. Section 2349 confirms this understanding. It defines the courts of appeals' "exclusive jurisdiction" as embracing the power to issue "a *judgment* determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency," *id.* § 2349(a) (emphasis added). The statute thus reserves certain kinds of "proceedings" and "judgment[s]" to the courts of appeals.

The rest of the Act likewise outlines the procedures for obtaining such relief. The Act specifies that the proceeding "shall be against the United States," *id.* § 2344, limits the period for review to 60 days after an order's entry, *id.*, and restricts statutory standing to parties who participated in the agency proceedings, *id.* §§ 2344, 2348. The Hobbs Act thus gives the courts of appeals "exclusive jurisdiction" limited to a specific type of action for a specific type of relief (declaratory or injunctive) against a specific party (the United States). But it does not give the courts of appeals jurisdiction over the whole or part of any other kind of suit. And in particular, it says nothing about the district courts' consideration of cases properly before them. Nothing in the Hobbs Act, therefore, suggests any limitation on the power of district courts to fully consider a party's defenses to private civil damages claims.

I.B. The Administrative Procedure Act confirms the Fourth Circuit's error. It provides that, generally speaking, "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Because Carlton & Harris sought to enforce the FCC's interpretation of the TCPA, as reflected in the 2006 Order (or, more precisely stated, sought to enforce Carlton & Harris's interpretation of

the FCC's interpretation), the APA entitles PDR to judicial scrutiny of that "agency action" within the private enforcement proceeding authorized by the TCPA.

Section 703, to be sure, provides that judicial review within an enforcement proceeding is not required when "prior, adequate, and exclusive opportunity for judicial review is provided by law." *Id.* But, for at least five reasons, the Hobbs Act did not give PDR such an opportunity.

(1) PDR lacked statutory standing under the Hobbs Act. Hobbs Act review is available only to a "party aggrieved" by an order. 28 U.S.C. § 2344. The courts of appeals have unanimously read this language "to require as a general matter that petitioners be parties to any proceedings before the agency preliminary to issuance of its order." *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983) (citing cases). Because PDR did not participate in the FCC proceedings that gave rise to the 2006 Order, it could not have petitioned under the Hobbs Act.

(2) PDR was out of time to petition for review under the Hobbs Act. Hobbs Act review is available only within 60 days of the agency's issuance of a covered order. 28 U.S.C. § 2344. The courts of appeals have unanimously read that limitations period as jurisdictional. The window for anyone to seek Hobbs Act review of the 2006 Order thus closed in mid-2006—seven years before PDR sent its fax and nearly a decade before Carlton & Harris filed the complaint that initiated this suit.

(3) PDR had no practical reason to seek review of the 2006 Order during the allotted 60 days. Recall that PDR argued (and continues to believe) that the FCC's interpretation, properly understood, is consistent with

the TCPA. The need for review arose only when Carlton & Harris advanced an expansive reading of the FCC's position that numerous courts had rejected. If "prior, adequate" judicial review is provided by giving a party just 60 days to identify and protest all potentially adverse constructions of an agency interpretation that may hypothetically arise years later in litigation, the term "adequate" has lost all meaning.

(4) Such a construction would also empty the relevant language of section 703 of all practical effect, at least as concerns orders that announce agency interpretations of general applicability. A generally applicable interpretation, by its nature, applies to all manner of parties who are not "aggrieved" and therefore cannot obtain Hobbs Act review. Section 703 thus provides, appropriately, that judicial review ordinarily will be available when the rule is enforced against a particular party, except when "prior, adequate, and exclusive" review was available. To read Hobbs Act review as satisfying this requirement would be to allow the exception to swallow the rule.

(5) That reading would be particularly unwarranted because Congress knows how to expressly say it wants direct review to be the only avenue for challenging agency action in court. The Clean Water Act, for example, provides for direct review of Environmental Protection Agency actions in the courts of appeals, and separately specifies that orders that could have been challenged via direct review are generally not subject to judicial review in civil or criminal enforcement proceedings. Such statutes, however, are the exception that proves the rule. General direct review statutes such as the Hobbs Act do not implicitly preclude the judicial review in enforcement actions that section 703 expressly preserves.

I.C. Two additional interpretive canons counsel against the Fourth Circuit's interpretation of the Hobbs Act. First, that interpretation violates the presumption of reviewability of agency action. As noted, Hobbs Act review will often be unavailable to parties affected by a generally applicable rule announced by an agency. And the *ersatz* review pathways suggested by some courts that have adopted the Fourth Circuit's interpretation—petitioning the agency, and then appealing the agency's ruling under the Hobbs Act—are cumbersome at best and almost always illusory. The only certain route to judicial review is to allow defendants to raise their legal defenses in enforcement proceedings, before the court tasked with determining liability and measuring any accompanying damages.

I.D. Second, if accepted, the Fourth Circuit's interpretation of the Hobbs Act would raise grave constitutional concerns. Under that interpretation, PDR would be barred from litigating a statutory defense that it never had a full and fair opportunity to present to any court, on the theory that an agency has put the issue to rest without any judicial determination whatsoever. The Fourth Circuit's interpretation thus announces a new species of issue preclusion that attaches without due process. And by requiring the district court to determine PDR's liability for violating the TCPA based on an agency's effectively unreviewable interpretation of what the TCPA means, the Fourth Circuit's interpretation raises deep and troubling separation of powers questions. This Court can and should avoid these constitutional issues by adopting a conventional construction of the Hobbs Act.

II. Alternatively, the Hobbs Act did not require the district court in this case to accept the FCC's interpretation of the TCPA because the agency's discussion in

the 2006 Order of offers for free goods and services represents a mere interpretive rule. Under general principles of administrative law, interpretive rules do not bind courts or private parties, and frequently are not even reviewable by a court until applied by an agency to a particular party.

The Hobbs Act reflects this principle: to qualify as an FCC "order" reviewable under the Act, a rule must have the force of law, which interpretive rules do not. The Fourth Circuit overlooked this key distinction by assuming, without analysis, that the 2006 Order in its entirety was a binding legislative rule. But the Commission's discussion of "offers for free goods or services and informational messages" bears all the hallmarks of an interpretive rule. The district court therefore was not bound, by the Hobbs Act or otherwise, to slavishly follow it, and was instead free to interpret the TCPA using appropriate tools of statutory construction. The district court did exactly that, and correctly concluded that Carlton & Harris's complaint fails to plausibly allege that PDR violated the TCPA. That determination should be upheld.

ARGUMENT

I. THE HOBBS ACT DOES NOT PRECLUDE A DISTRICT COURT FROM DECIDING LEGAL QUESTIONS IN TCPA ENFORCEMENT SUITS BETWEEN PRIVATE PARTIES.

A. The Hobbs Act Solely Addresses Suits Against The Government Seeking Equitable Or Declaratory Relief From Unlawful Agency Action.

The Fourth Circuit's cursory statutory analysis focused almost exclusively on a single phrase of the Hobbs Act: the language in § 2342 giving the courts of

appeals "'exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of'" certain agency orders. Pet. App. 7a (quoting 28 U.S.C. § 2342). Without explaining the textual basis for its conclusion, the Fourth Circuit read this language as "specifically stripp[ing] jurisdiction from the district courts" to review "FCC interpretations of the TCPA." Pet. App. 7a, 8a. The Fourth Circuit then went on to say, remarkably, that it was *improper* for the district court to attempt to "harmonize" the agency's interpretation of the TCPA with the statutory text itself because, when "the plain meaning of the regulation is clear, our interpretive task is complete." Pet. App. 13a–14a; *contra Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 95 (1995) (upholding agency's "reading of [Medicare] regulations" because it was "consistent with the Medicare statute"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) (rejecting SEC's reading of Rule 10b-5 because it departed from "the language and history of s[ection] 10(b) [of the Exchange Act] and related sections of [other] Acts").

The Fourth Circuit's radical reading of the Hobbs Act finds no support in its text. The Act, rather, speaks *only* to jurisdiction over a specific type of proceeding: one for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government.

The limited scope of the Hobbs Act is evident in § 2342 itself. That provision gives the courts of appeals "exclusive jurisdiction" attached to a particular set of remedies. What is made "exclusive" to the courts of appeals is the "jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency actions, including, as relevant here, "all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." The

Fourth Circuit thus erred in reading the Hobbs Act to speak to jurisdiction over "certain *issue[s]*." Pet. App. 8a (emphasis added). The statute is much narrower than that. Rather than encompass *all* judicial review of particular issues, such as "FCC interpretations of the TCPA," Pet. App. 7a, § 2342 defines the courts of appeals' "exclusive jurisdiction" in terms of specific types of *relief* that a court of appeals alone may grant. Only a court of appeals may enjoin an agency order covered by the Hobbs Act. And only a court of appeals may vacate the order, stay it, or enter declaratory relief against it. That is all § 2342 says about the exclusive scope of court of appeals review, and that is therefore all that the Hobbs Act precludes a district court from doing.

Some of the courts that have reached the same basic conclusion as the Fourth Circuit have sought to justify a broader preclusive sweep by relying in isolation on the phrase "determine the validity of" in § 2342. They have reasoned that a court decides the "validity" of an agency interpretation anytime it considers whether the agency's interpretation is consistent with the governing statute. *E.g.*, *Nack v. Walburg*, 715 F.3d 680, 685–86 (8th Cir. 2013); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 445 (7th Cir. 2010). This interpretation, however, fails to consider the statutory context in which the phrase "determine the validity of" sits.

In particular, it ignores the "commonsense canon of *noscitur a sociis*," which "counsels that a [term] is given more precise content by the neighboring words with which it is associated," *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634–35 (2012), and which "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress," *McDonnell v. United*

States, 136 S. Ct. 2355, 2368 (2016). Here, the terms that surround the phrase "determine the validity of"—enjoin, vacate, and set aside—all plainly refer to forms of relief. *See* Black's Law Dictionary (10th ed. 2014) (defining "set aside" as "to annul or vacate (a judgment, order, etc.)"). The canon thus counsels that "determine the validity of" refers simply to another form of relief—declaratory relief.

Indeed, this Court has repeatedly used the phrase "determine the validity" in precisely this sense. For example, this Court explained that the Declaratory Judgment Act, 28 U.S.C. § 2201, permits "an insurance company [to] bring a declaratory judgment action to determine the validity of insurance policies." *Calderon v. Ashmus*, 523 U.S. 740, 746 (1998). Likewise, just five years before the Hobbs Act's enactment, in *Railway Mail Ass'n v. Corsi*, the Court noted that the appellant had initiated the litigation by "fil[ing] suit" against a state agency "in a state court for *a declaratory judgment to determine the validity* of [a state statute], and related provisions, and for an injunction restraining its enforcement." 326 U.S. 88, 91 (1945) (emphasis added). The courts of appeals of that era used similar language to connote declaratory relief. *See, e.g.*, *Gray v. N.M. Military Inst.*, 249 F.2d 28, 30–31 (10th Cir. 1957) ("The declaratory judgment remedy may not be invoked merely to try issues or determine the validity of defenses in pending cases.").

Thus, in context, the natural reading of § 2342's "exclusive jurisdiction" phrase is that it concerns "exclusive jurisdiction" over a grant of injunctive or declaratory relief against the government. Therefore, when no such relief is sought—as in a private TCPA class action suit for monetary damages—the Hobbs Act has no bearing on the power of the district court to decide the case.

A holistic look at the Hobbs Act's text and structure confirms this reading. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and "cannot be construed in a vacuum." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012); *see also U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). The Fourth Circuit, however, focused narrowly on the "exclusive jurisdiction" phrase in § 2342, and failed to ask what clues about its meaning should be drawn from neighboring provisions.

Perhaps the single most telling clue comes from § 2349, entitled "Jurisdiction of the proceeding." Section 2349(a), which parallels § 2342, expressly defines the court of appeals' "exclusive jurisdiction" with reference to the specific types of relief the court may award. It provides that the court of appeals has "exclusive jurisdiction to make and enter . . . a *judgment* determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." 28 U.S.C. § 2349(a) (emphasis added). This provision resolves any doubts about the meaning of the phrase "determine the validity of." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."). In tying the "determine the validity" phrase to a "judgment," § 2349 makes clear that the phrase refers to a remedy that the courts of appeals may enter as part of the judgment.

Other provisions of the Hobbs Act point in the same direction by defining the rules and procedures for actions to obtain such judgments. The Act defines *where* such actions may be brought, 28 U.S.C. § 2343 ("in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit"); *how*, *id.* § 2344 (by "fil[ing] a petition to review" the final order); *when*, *id.* ("within 60 days" of entry of the final order); *by whom*, *id.* ("[a]ny party aggrieved by the final order"); and *against whom*, *id.* ("against the United States"). The Act as a whole thus spells out the metes and bounds of the particular specialized "proceedings" over which the courts of appeals' jurisdiction is "exclusive." And, just as importantly, it does not say a word about any other type of judicial action in any other court.

Further textual support appears in Section 402(a) of the Communications Act, which the Hobbs Act incorporates by reference. *See* 28 U.S.C. § 2342(1). Mirroring § 2342, section 402(a) provides that, with certain exceptions not applicable here, "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28 [*i.e.*, the Hobbs Act]." 47 U.S.C. § 402(a). Like the Hobbs Act, Section 402(a) speaks only to proceedings "brought" to obtain non-monetary relief against the FCC; it does not address judicial proceedings of other kinds, brought against other parties in other courts.

The text of the Hobbs Act thus resolves the question presented in this case. The Act establishes and regulates "proceedings" in which a party aims to obtain equitable or declaratory relief against the government from allegedly unlawful agency action. A TCPA damages suit between two private parties plainly is not

such a "proceeding"—a point well illustrated by the district court's judgment in this case, which directs that Carlton & Harris's damages claim "be dismissed and stricken from the docket of [the district] [c]ourt." Pet. App. 44a. That judgment—which no court of appeals could grant in a Hobbs Act proceeding—does not affect the rights or duties of the FCC or any other part of the government. It simply says that the plaintiff shall take nothing from the defendant. Nothing in the Hobbs Act precludes a defendant in a private damages case from making the legal arguments necessary to win that relief from a district court with jurisdiction over the case under § 1331. The Fourth Circuit erred in concluding otherwise.

B. The Administrative Procedure Act Confirms That A Defendant Generally May Challenge Agency Action In A Judicial Enforcement Proceeding.

The APA, which was enacted a few years before the Hobbs Act, but long after Congress began to provide regularized judicial supervision over agency actions through "special statutory review proceeding[s]," 5 U.S.C. § 703, also compels reversal of the decision below. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (recognizing that the APA "codifies the nature and attributes of judicial review" under the Hobbs Act).

Section 703 of the APA speaks directly to the question presented here. It first addresses how parties can obtain direct review of agency action, providing that they generally must avail themselves of any "special statutory review proceeding," such as that created by the Hobbs Act, but can proceed under the APA itself where no such proceeding is available. 5 U.S.C. § 703. It then provides that, notwithstanding these pathways to direct review, "agency action is subject to judicial

review in civil or criminal proceedings for judicial enforcement," "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law." *Id.* Thus, section 703 confirms that agency action *is* reviewable in judicial enforcement proceedings, except where another statute provides an opportunity for judicial review that is (1) prior, (2) adequate, *and* (3) exclusive. Because PDR had no such opportunity, section 703 confirms that PDR is entitled to judicial review of the 2006 Order in this TCPA enforcement proceeding.

1. The Hobbs Act did not give PDR any prior or adequate opportunity for review of the 2006 Order because it denied PDR standing to seek such review. As noted, § 2344 states that Hobbs Act review is available only to a "party aggrieved" by agency action, and the long established construction is that this phrase extends statutory standing under the Hobbs Act only to those parties who participated in the agency proceeding; no others may petition for review under the Act. *Simmons*, 716 F.2d at 42 (citing cases). PDR did not participate in the proceedings that gave rise to the 2006 Order, and thus could not have petitioned under the Hobbs Act.

2. If PDR had attempted to seek Hobbs Act review after Carlton & Harris sued, it would have encountered a second problem—its petition would have been hopelessly out of time. Section 2344 permits suit only within 60 days after the agency issues a covered order, and every court of appeals to consider the issue has held that the time limit is jurisdictional and "may not be enlarged or altered by the courts." *Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 & n.43 (D.C. Cir. 1981) (citing cases from the Second, Fifth, and Eighth Circuits); *see Council Tree Inv'rs, Inc. v. FCC*, 739 F.3d 544, 551 (10th Cir. 2014);

N.J. Dep't of Envtl. Prot. & Energy v. Long Island Power Auth., 30 F.3d 403, 414 (3d Cir. 1994); *Tenn. Pub. Serv. Comm'n v. ICC*, 921 F.2d 277 (6th Cir. 1990) (citing cases from Fifth and Ninth Circuits); *Ill. Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983); *P.A.K. Transp., Inc. v. United States*, 613 F.2d 351, 353 n.1 (1st Cir. 1980). The time in which to seek Hobbs Act review thus expired long before the current TCPA suit began.

3. PDR had no practical reason to seek review of the 2006 Order during the allotted 60 days because the interpretive issue at the heart of this suit was not joined until after the litigation began. Before then, readers of the 2006 Order had no basis to suspect the FCC had announced a "per se" rule barring faxed offers of free goods and services, as Carlton & Harris argued below.[4] That point is borne out by the fact that multiple courts have rejected the construction of the 2006 Order's language that the Fourth Circuit adopted below. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 96 & n.1 (2d Cir. 2017). Those courts have recognized that "*not every*" unsolicited fax promoting a free good or service satisfies the rule announced in the 2006 Order. *Id.* at 96 (emphasis added). Rather, for such a fax to fall under the 2006 Order, "[t]here must be a commercial nexus to a firm's business, *i.e.*, its property, products, or services." *Id.*; *see also Sandusky Wellness Ctr., LLC v. Medco Health Sols.*, 788 F.3d 218, 223–24 (6th Cir. 2015) ("To be an ad, the fax must promote goods or services that are for sale, and the sender must have profit as an aim."). This "comports with the statutory language, which defines offending advertisements as those promoting 'the

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[4] Indeed, as demonstrated in Part II, *infra*, all indications were that the FCC had articulated a non-binding interpretation, rather than a binding legislative rule.

commercial availability or quality of [the firm's] property, goods, or services.'" *Physicians Healthsource*, 847 F.3d at 95 (alteration in original) (emphasis added) (quoting 47 U.S.C. § 227(a)(5)). Thus, to say that PDR should have sued in 2006 is essentially to contend that it should have anticipated Carlton & Harris's argument and initiated preemptive litigation against the FCC to protect itself against such hypothetical, overbroad constructions of the 2006 Order that conflict with the statute.

Even assuming that any court of appeals could or would have entertained such an abstract dispute, there is certainly no reason to view that kind of premature litigation as supplying an "adequate" opportunity for judicial review of the Commission's legal interpretation. And the courts of appeals have not embraced that approach. Instead, they recognize that with respect to generally applicable rules, the Hobbs Act's "time limit restricting judicial review of [agency] action is applicable only to cut off review directly from the order promulgating a rule," not from subsequent actions by an agency to enforce it. *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); *see Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 714–15 (9th Cir. 1991); *Texas v. United States*, 749 F.2d 1144, 1146 (5th Cir. 1985); *Tri-State Motor Transit Co. v. ICC*, 739 F.2d 1373, 1375 (8th Cir. 1984); *Ill. Cent. Gulf R.R.*, 720 F.2d at 961.

That approach makes perfect sense. Because "administrative rules and regulations are capable of continuing application[,] limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Functional Music*, 274 F.2d at 546.

That would include parties that first come into existence after the 60-day direct review window has closed, as well as parties for whom "the ultimate impact, or even the likelihood of enforcement, of proposed rules may be far from clear." *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973).

These concerns are particularly acute in the context of the TCPA, which regulates literally every business using auto-dialed or recorded calls, faxes, or text messages in the United States. *See* 47 U.S.C. § 227(b). In the context of a more highly regulated industry, this Court recognized the unreasonableness of expecting "innumerable small businesses" to protect themselves against agency overreach by staying abreast of rulemakings and bringing litigation against invalid rules. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 n.2 (1978). It is all the more unrealistic to expect businesses of every size in every field to protect themselves from unlawful TCPA regulations by scrutinizing the FCC docket and bringing pre-enforcement challenges under the Hobbs Act—especially given that the interval between the unlawful regulation and the fax at issue might be years, as it was here.

4. The only other way to read section 703 would be to say that the Hobbs Act's 60-day window in 2006 somehow counts, for PDR, as the "prior, adequate, and exclusive" review opportunity contemplated by the APA. But that cannot be right, or else the exception (no further review if the defendant already had a full, fair and final opportunity) would swallow the rule ("agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement") where agency rules of general applicability are concerned. Such rules, by their nature, apply to all manner of parties who are not "aggrieved" under the Hobbs Act and thus cannot personally obtain Hobbs Act review. *See*

Functional Music, 274 F.2d at 546. If the Act's 60-day window were the sole opportunity for all parties to challenge a generally applicable regulation for all time, the Hobbs Act would become a trap for the unwary, which never has been and cannot be the law.

This is not to say that the Hobbs Act *never* provides a "prior, adequate, and exclusive" opportunity for judicial review. When an agency issues an order settling the rights or duties of a specific party, that party is undoubtedly "aggrieved" within the meaning of § 2344 and can challenge the order under the Hobbs Act. In that circumstance, the distinction between direct and enforcement review frequently collapses, and the Hobbs Act furnishes a "prior, adequate, and exclusive" mechanism for challenging the order, both facially and as-applied. But this logic is limited to party-specific orders; for orders promulgating rules of general applicability, a party may not be "aggrieved" in any legal or practical sense until it faces a judicial enforcement action. In that circumstance, section 703 preserves the right to judicial review.

Two decisions of this Court illustrate the point. In *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, a defendant in a suit for damages owed under a port agreement approved by the Federal Maritime Commission sought to assert as a defense that the agreement was invalid. *See* 400 U.S. 62, 64, 67 (1970). This Court held that the Hobbs Act precluded that challenge because the defendant, through an agent, had been party to a prior proceeding before the Federal Maritime Commission seeking review of the agreement, and, after the commission upheld the agreement, both the defendant and its agent had failed to seek timely judicial review. *See id.* at 69, 71–72. Thus, in every practical sense, the defendant had a "prior, adequate, and exclusive" opportunity for

review of the agency order. As the Court emphasized, although the defendant "was not named as a party [to the agency proceedings], it was in fact represented before the Commission," had "previously made numerous claims to party status," and had "interests [that] were clearly at stake." *Id.* at 71–72. Because the defendant had both every motive and "every opportunity to participate before the Commission and then seek timely review in the Court of Appeals," *id.* at 72, this Court refused to allow the defendant to challenge the order in a district court proceeding.

FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984), is to similar effect. There, ITT petitioned the FCC for rulemaking regarding what sorts of agreements the FCC could enter into when negotiating with foreign governments. *See id.* at 465–66. When the FCC denied the petition, ITT sought review in the D.C. Circuit and concurrently filed suit in district court to enjoin the FCC from engaging in negotiations in the manner ITT opposed. *See id.* at 466–67. This Court held that the Hobbs Act precluded ITT from asking the district court "to enjoin action that is the outcome of [an FCC] order" where, "[i]n substance, the complaint filed in the District Court raised the same issues and sought to enforce the same restrictions upon agency conduct as did the petition for rulemaking that was denied by the FCC." *Id.* at 468. Thus, like *Port of Boston*, *ITT* prohibited a collateral attack on an agency order by a party that had a full and fair opportunity for judicial review under the Hobbs Act—*i.e.*, the "prior, adequate, and exclusive" review envisioned by section 703.

Together, *Port of Boston* and *ITT* exemplify when it may be appropriate to say that direct review of an agency order qualifies as a "prior, adequate, and exclusive" opportunity for review. In those cases, the parties

who sought district court review had also been parties (or had been adequately represented) in an agency proceeding that directly settled their legal rights and obligations. In that kind of setting, it generally can be said that the party has had a full and fair opportunity for review, and should not be permitted to evade the "special statutory review proceeding" established by Congress. *See ITT*, 466 U.S. at 468.

The same cannot be said where, as here, the agency first acts by announcing a rule of general applicability, and the defendant only later—much later—becomes subject to an enforcement action. In that circumstance, as the *Functional Music* line of cases recognizes, it would be both unfair and impractical to treat the Hobbs Act as having preclusive effect—and would also flatly violate section 703's command.

5. The Fourth Circuit's holding is also at odds with how courts have long interpreted other statutes that commit direct review of agency orders to a court of appeals. Consistent with section 703, courts have not understood such statutes to preclude judicial review of regulations when they are enforced in district court. By casting doubt on that understanding, the Fourth Circuit's interpretation of the Hobbs Act would open the door to a range of unjust and absurd consequences.

Examples of comparable statutory schemes are found across the U.S. Code. For instance, orders promulgating occupational safety and health standards are directly reviewable in the courts of appeals, *see* 29 U.S.C. § 655(f), but enforceable through civil and criminal proceedings in district court, *see id.* §§ 662(a), 666(e). Under the Fourth Circuit's logic, the former provision would preclude review in enforcement actions brought under the latter ones. Yet when the Secretary of Labor (or Department of Justice, in criminal cases) has brought such enforcement actions, the

courts—including this one—have considered defendants' arguments that the orders at issue are substantively invalid. *See, e.g.*, *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 4, 7–9 (1980) (in civil action to enjoin violation of a regulation promulgated under the Occupational Safety and Health Act, examining "whether this regulation is consistent with the Act"); *see also United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1346, 1354 (N.D. Ill. 1997) (in criminal prosecution for violation of occupational safety regulation, considering argument that regulation was procedurally invalid).

The same is true in the securities context. Under the Exchange Act, courts of appeals have "exclusive" jurisdiction to directly review final orders and certain regulations issued by the Securities and Exchange Commission, *see* 15 U.S.C. § 78y(a)(1), (3); *id.* § 78y(b)(1), (3), while the government may bring civil and criminal actions to enforce those orders and regulations in district court, *see id.* §§ 78ff(a), 78u(d), 78u-1(a)(1). Again, the Fourth Circuit's logic would suggest that the provisions for direct review preclude judicial review in the enforcement context. And, again, the practice has been precisely the opposite. In enforcement proceedings, this Court and others have routinely considered defendants' arguments that the SEC's interpretations of the law, as reflected in orders and regulations, are substantively invalid, or must be narrowed to cohere with the statute's text. *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642, 666–76 (1997) (SEC did not exceed its statutory authority under § 14(e) of the Exchange Act in adopting Rule 14e–3(a)); *Ernst & Ernst*, 425 U.S. at 212–14 (rejecting SEC interpretation of Rule 10b-5 as inconsistent with text of the Exchange Act); *SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 795–96 (S.D.N.Y. 2018) (considering defendant's argument that Rule

17a–8 "is not a reasonable interpretation of the Exchange Act, and is therefore invalid").

In short, if applied to the many materially indistinguishable judicial review statutes currently in effect, the Fourth Circuit's interpretation of the Hobbs Act would curtail the defenses available to a large number of parties in a wide range of contexts—including many where defendants' fortunes, livelihoods, and even liberty are directly at stake. This outcome is frankly unimaginable.

Worse, by broadly precluding judicial review in enforcement settings, the Fourth Circuit's interpretation of the Hobbs Act (and, by extension, other commonplace judicial review provisions) would produce all manner of unfair and absurd results. For example, it would allow agencies to effectively insulate their interpretations from review by enforcing them in district court rather than in administrative proceedings subject to direct court of appeals review. It would also mean that if Congress decided to supersede an agency interpretation by enacting a new statute, the statute could not be given effect in an enforcement suit until the agency itself revised its preexisting regulations. That is so because, under the Fourth Circuit's rule, a district court would have no power to consider whether the agency's old interpretation was consistent with the new law. And if the agency announced that its interpretation of the new law was identical to its interpretation of the old one, a district court would likewise be powerless to protect defendants.

It is improbable, to say the least, that Congress intended to subordinate both its own powers and those of the courts to administrative agencies in these ways. And if Congress really did intend such consequences, at a minimum it would have to speak more explicitly than it did in the Hobbs Act.

6. Indeed, it bears emphasis that in the unusual circumstance where Congress has in fact intended to preclude judicial review of agency interpretations even in enforcement proceedings, it has expressed that intention in no uncertain terms. The Clean Water Act provides one example. Section 1369(b)(1) "enumerates seven categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018); *see* 33 U.S.C. § 1369(b)(1). Paragraph (b)(2) then states: "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection *shall not be subject to judicial review in any civil or criminal proceeding for enforcement.*" 33 U.S.C. § 1369(b)(2) (emphasis added). Provisions of the Clean Air Act and of CERCLA—both of which commit direct review of covered orders exclusively to a court of appeals—are similar. *See* 42 U.S.C. § 7607(b)(2); *id.* § 9613(a).

That Congress felt the need in these statutes to specify that review is unavailable in "civil or criminal proceeding[s] for enforcement" is significant. Under the Fourth Circuit's view, the fact that these statutes contain direct review provisions that route "exclusive" jurisdiction to the courts of appeals would alone suffice to preclude district courts from reviewing orders in enforcement proceedings—in other words, the provisions expressly precluding such review would be unnecessary. This Court, however, is "hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998). The better interpretation, which "give[s] effect ... to every clause and word" of the environmental statutes, is that the provisions constraining judicial review in enforcement proceedings *are* meaningful because the direct

review provisions, standing alone, say nothing about that issue. *Setser v. United States*, 566 U.S. 231, 239 (2012) (ellipsis in original). Section 703 of the APA confirms that interpretation by providing that even when direct review of agency orders lies exclusively in courts of appeals, the default rule is that district courts may review such orders in enforcement proceedings. Because the Hobbs Act leaves that default rule intact, the Fourth Circuit's view that it bars judicial review in a private enforcement action is wrong.

C. The Presumption Of Reviewability Of Agency Action Supports Construing The Hobbs Act Narrowly.

To the extent the Hobbs Act and APA leave any ambiguity, the "strong presumption that Congress intends judicial review of administrative action" counsels against construing the Act to preclude a defendant from obtaining review of the FCC's interpretation of the TCPA in an enforcement action. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Without that ability, many defendants will have no opportunity for judicial review of the orders being enforced against them because, in most cases, the 60-day window for direct review under the Hobbs Act will have long since closed.

To address this problem, some courts that have read the Hobbs Act as the Fourth Circuit did here have suggested that TCPA defendants may pursue judicial review by (1) filing a petition for reconsideration or rulemaking with the FCC and then (2) appealing any adverse decision by the FCC to a court of appeals. *See, e.g.*, *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir. 2013); *Nack*, 715 F.3d at 682. This suggestion, however, ignores that section 703 preserves the right to review in enforcement actions unless another route is "prior, adequate *and* exclusive,"

and that the option of filing a petition with the agency *after* a suit commences is none of the above. Neither the petitions nor the eventual court of appeals proceeding would be *prior* to the enforcement suit. Moreover, the court of appeals proceeding would not actually review the "agency action" at issue in the TCPA suit; rather, it would review the distinct agency action resulting from the new petition. *Cf. Bhd. of Locomotive Eng'rs*, 482 U.S. at 278–80 (distinguishing a decision respecting a petition to reopen a proceeding from the decision in the underlying proceeding itself).

There are also serious practical problems with these alternatives that will prevent them, in most if not all instances, from providing pathways to judicial review of an underlying rule. For reconsideration and declaratory ruling petitions, the main problem is one of timing. A petition for reconsideration must be filed within 30 days of an order's promulgation. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.104(b). In almost every conceivable enforcement setting, that deadline will have long passed before a plaintiff's complaint alerts a defendant to the problem. Petitions for declaratory rulings are generally useless in this setting for a similar reason. The FCC has opined that "[t]o allow ... parties to challenge the validity of [a] rule via a request for declaratory ruling years after a rule has been promulgated would effectively circumvent the statutory channels for review of Commission rules." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 13998, 14006 (2014), *vacated sub nom. Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018). In other words, the FCC generally rejects the premise that a declaratory ruling may be used as a substitute for the direct review available under the Hobbs Act.

Petitions for new rulemakings pose a different but equally fundamental problem. "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). No such language appears in the TCPA. Thus, any new rules would be prospective, and a new *prospective* rule will not do anything to protect a defendant from liability for *past* conduct. Relief can come only from an adjudication of what the law was at the time of the defendant's relevant acts. That adjudication is naturally provided by a court—the court that has jurisdiction over the claims lodged against the defendant.

Another practical problem is that petitions for rulemaking and declaratory orders frequently drag on for years. *See, e.g., Bais Yaakov*, 852 F.3d at 1081 (holding, in 2017, that the FCC lacked authority to issue TCPA regulation concerning solicited faxes and vacating a 2014 FCC order denying a petition for a declaratory ruling filed in 2010); *cf. In re Pesticide Action Network N. Am.*, 798 F.3d 809, 814 (9th Cir. 2015) (granting mandamus following eight-year delay in resolving petition); *In re Core Commc'ns, Inc.*, 531 F.3d 849, 857 (D.C. Cir. 2008) (describing six-year delay in responding to judicial remand); *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80–81 (D.C. Cir. 1984) (describing FCC delays of two, four, and five years in resolving petitions).

The district court presiding over the TCPA suit can, of course, grant a discretionary stay of the action while the defendant pursues matters with the agency. But courts in TCPA suits have denied requests for such stays, viewing the route to Hobbs Act review as long and the outcome, uncertain. *See, e.g., Edwards v.*

Oportun, Inc., 193 F. Supp. 3d 1096, 1101 (N.D. Cal. 2016) (denying stay pending issuance of D.C. Circuit decision on validity of TCPA regulation because there was "no certain way to determine when a ruling will be forthcoming"); *Lathrop v. Uber Techs., Inc.*, 2016 WL 97511, at *5 (N.D. Cal. Jan. 8, 2016) (similar); *Hofer v. Synchrony Bank*, 2015 WL2374696, at *2–3 (E.D. Mo. May 18, 2015) (similar).[5] For defendants in such cases, the Hobbs Act pathway will often be too slow to make any difference in the TCPA suit.

Further, even if a stay of the TCPA action were certain, the length and expense of litigating an entirely separate action through multiple levels of agency and judicial review would be prohibitive for many defendants. *Cf. Bridgeview Health*, 816 F.3d at 941 (noting that the TCPA has "become the means of targeting small businesses"). This problem is especially severe because TCPA suits, including this one, are commonly brought as class actions seeking uncapped statutory damages. Faced with the risks inherent in such actions, many defendants will settle early on, "rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (recognizing "the risk of 'in terrorem' settlements that class actions entail"); *ACA Int'l*, 885 F.3d

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[5] To be sure, some courts have granted stays in such circumstances. *See Flockhart v. Synchrony Bank*, 2017 WL 3276266, at *3 (N.D. Iowa Aug. 1, 2017) (granting stay, noting that "[f]ederal courts have split decisions in motions to stay TCPA violation cases" pending Hobbs Act review of underlying FCC rules, and citing cases). But the fact remains that in cases that are not stayed, defendants risk losing the opportunity for any meaningful judicial review.

at 693 (noting a "surge in TCPA lawsuits (including class actions) in recent years").

D. The Fourth Circuit's Interpretation Of The Hobbs Act Raises Grave Constitutional Concerns That Can And Should Be Avoided.

The canon of constitutional avoidance further supports PDR's narrower construction of the Hobbs Act. If, as PDR contends, the Hobbs Act simply routes claims against the government for injunctive and declaratory relief from certain agency actions to the courts of appeals rather than the district courts, then the Act does not raise any constitutional concerns—it is uncontroversial that Congress may distribute jurisdiction over such causes of action among Article III courts.

But if, as the Fourth Circuit held, the Hobbs Act's grant of "exclusive jurisdiction" over proceedings for injunctive and declaratory relief also operates, implicitly, to bar district courts from considering statutory defenses raised by defendants in damages suits between private parties, then the Hobbs Act poses at least two grave constitutional questions.

The first, based on fundamental notions of due process, concerns whether Congress may bind defendants to the results of agency proceedings that are not challenged within a 60-day period, or are challenged only by other parties. The second, arising under Article III, concerns whether Congress may require the courts, in deciding cases properly before them, to slavishly apply an agency's interpretation of a statute. Long established principles of constitutional avoidance counsel against adopting the construction "that raises serious constitutional doubts," and in favor of "adopt[ing] an

alternative" construction like PDR's, which is consistent with the statute's text and "avoids those problems." *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

1. The Fourth Circuit's Interpretation Raises Grave Due Process Concerns.

Under the Fourth Circuit's interpretation, the Hobbs Act imposes what is in essence a severe form of issue preclusion, barring TCPA defendants from litigating issues in a TCPA suit that could have been decided in a proceeding for direct review under the Hobbs Act, even if they never actually were. This approach jettisons several limits on issue preclusion essential to respecting due process.

The traditional rule of issue preclusion is that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015) (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27, at 250 (1980)). Critically, preclusion requires the estopped party to have had "a full and fair opportunity to litigate" the issue in the prior proceeding. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

These requirements are part of a "deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 892–93. They represent constitutional boundaries that neither courts nor Congress may transgress. As this Court has repeatedly recognized, "[i]t is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be

heard." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979). Litigants "who never appeared in a prior action [] may not be collaterally estopped without litigating the issue." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *accord Richards v. Jefferson Cty.*, 517 U.S. 793, 797 n.4 (1996).

The Fourth Circuit's decision applied the Hobbs Act in precisely the manner these decisions prohibit. PDR was not a party to the agency proceedings that underlie the 2006 Order, let alone to a prior relevant litigation. Thus, the Fourth Circuit's conclusion that PDR is effectively estopped from raising any argument bearing on the consistency between the 2006 Order and the TCPA itself raises grave due process concerns.[6]

2. The Fourth Circuit's Interpretation Raises Severe Separation of Powers Concerns.

As interpreted by the Fourth Circuit, the Hobbs Act would also raise a serious question about whether

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[6] This Court has not considered the constitutionality of provisions in the Clean Air Act and other statutes expressly precluding judicial review of agency actions in enforcement proceedings. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980); *supra* at 37 (describing such provisions). Its decision in *Adamo Wrecking Co. v. United States*, however, recognized that the "severity" of such provisions warrants narrowly construing the range of actions to which they apply. 434 U.S. at 282–84 & n.2. Furthermore, Justice Powell, who provided the fifth vote in *Adamo Wrecking*, stressed in a concurring opinion in that case that the "constitutional validity" of such provisions "merited serious consideration." *Id.* at 289 (Powell, J. concurring); *see also Harrison*, 446 U.S. at 594 (Powell, J., concurring) ("I continue to have reservations about the constitutionality of the notice and review preclusion provisions of [the Clean Air Act]."). The D.C. Circuit has likewise recognized the "substantial due process question" such provisions pose. *Chrysler Corp. v. EPA*, 600 F.2d 904, 913 (D.C. Cir. 1979).

Congress has improperly intruded upon the defining attribute of Article III judicial power—the Judiciary's authority "'to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes").

According to the Fourth Circuit, the Hobbs Act "specifically stripped jurisdiction from the district court[]" to determine the meaning of the TCPA in this case. Pet. App. 8a. In truth, the Fourth Circuit's characterization of this supposed statutory command as "jurisdiction-stripping" is inapt. The district court clearly had subject-matter jurisdiction over the *suit*. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376 (2012) (federal and state courts have concurrent jurisdiction over private suits arising under the TCPA). But under the Fourth Circuit's view of the Hobbs Act, the district court nonetheless lacked authority to consider the dispositive legal question at the heart of that suit—the meaning of the statute that Carlton & Harris seeks to punish PDR for (supposedly) violating.

On that view, the Hobbs Act raises one of the deepest questions in the federal courts canon: the extent of Congress's power to strip Article III courts of the power to decide legal questions central to the "Cases or Controversies" pending before them.[7] Outside the

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[7] The question runs so deep in the canon that a variation upon it features in Professor Hart's famous dialectic: "Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think

context of a "war-time emergency measure," *Yakus v. United States*, 321 U.S. 414, 431 (1944), this Court has never directly addressed this question, but its decisions bearing on related questions concerning the intersection between the Legislative and Judicial powers, running back to at least *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), cast serious doubt on whether Congress may do so. In recently summing up those decisions in *Bank Markazi*, this Court treated it as beyond dispute that Congress "may not usurp a court's power to interpret and apply the law to the [circumstances] before it," and quoted *Marbury v. Madison* for the proposition that "[t]hose who apply [a] rule to particular cases, must of necessity expound and interpret that rule." 136 S. Ct. at 1323 (quoting 5 U.S. (1 Cranch) at 177) (alterations in original). In *City of Arlington v. FCC*, this Court declared that while "Congress has the power (within limits) to tell the courts what classes of cases they may decide," it may not "prescribe or superintend how they decide those cases." 569 U.S. 290, 297 (2013). And in *Plaut v. Spendthrift Farm, Inc.*, this Court read the "record of history" to demonstrate that the Founders crafted Article III "with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them." 514 U.S. 211, 218–19 (1995). These statements cast profound doubt on whether the Hobbs Act is constitutionally valid if interpreted to prevent courts presiding over private damages disputes, such as cases arising under the TCPA, from considering what that statute means.

That the Hobbs Act, as construed by the Fourth Circuit, does not just remove from the Judiciary the power

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Marbury v. Madison." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378–79 (1953) (footnotes omitted).

to interpret the law, but takes the further step of vesting that power in a mix of Executive and independent agencies, only worsens the separation-of-powers problem. This Court has carefully reserved to Article III courts the right to review the legal conclusions reached by agencies. Most notably, in *Crowell v. Benson*, the Court turned aside an Article III objection to a statute that insulated an agency's findings of fact from judicial review, reasoning in part that this insulation was "deemed to relate only to determinations of fact," not of law. 285 U.S. 22, 49 (1932); *see also St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied and whether the proceeding in which facts were adjudicated was conducted regularly."). *Crowell* has since been read for the proposition "that the judicial review afforded by the statute, including review of matters of law, 'provides for the appropriate exercise of the judicial function in this class of cases,'" *i.e.*, those "concern[ing] obligations among private parties." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 587 (1985) (quoting *Crowell*, 285 U.S. at 293). By reading the Hobbs Act to strip away judicial review of a critical legal dispute between private litigants, the Fourth Circuit's decision does serious violence to foundational safeguards of the administrative state.

As explained above, there are plenty of reasons for the Court to reject the Fourth Circuit's interpretation, even before reaching constitutional avoidance. But there is certainly no reason for this Court to read this commonplace agency review statute in the sweeping manner the Fourth Circuit did when the more than plausible construction offered by PDR avoids these fundamental difficulties. *See Jennings*, 138 S. Ct. at

836; *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (grounding the avoidance canon in the "reasonable presumption" that when a statute has two plausible interpretations, "Congress did not intend the alternative which raises serious constitutional doubts").

II. ALTERNATIVELY, THE DISTRICT COURT WAS NOT REQUIRED TO ACCEPT THE FCC'S INTERPRETATION IN THIS CASE BECAUSE THE AGENCY STATEMENTS AT ISSUE ARE NOT BINDING ON THE COURTS OR ANY PRIVATE PARTY.

The Fourth Circuit's decision is also wrong for a reason entirely independent of its misconstruction of the Hobbs Act. The Fourth Circuit assumed, without analysis, that the FCC's discussion of offers for free goods and services in the 2006 Order was a legislative rule, which binds courts and private parties, rather than an interpretive rule, which does not. That discussion in the 2006 Order, however, bears all the hallmarks of an interpretive rule. Therefore, under both general principles of administrative law and the text of the Hobbs Act, the district court was neither bound by the FCC's interpretation nor required to defer to it. It was free to construe the TCPA for itself and determine that PDR had not violated the statute.

The distinction between legislative and interpretive rules is central to administrative law. A legislative rule has the "force and effect of law," *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979), and thus binds courts, private parties, and the agency itself to its terms. *E.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000). Interpretive rules, in contrast, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). Rather, their "critical feature" is that they are

issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id.* Put another way, "interpretive rules or policy statements will not [bind agency discretion or private party conduct], *regardless* of their validity." *Viet. Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

The Fourth Circuit did not expressly consider whether the discussion of offers for free goods and services in the 2006 Order is a legislative rule, but that is the only reading that makes sense of the Fourth Circuit's assertion that it would be nonsensical "[t]o hold that a district court cannot enjoin or set aside a rule but is nevertheless free to ignore it (or decline[] to defer to it)." Pet. App. 10a–11a (internal quotation marks and citation omitted). That reading likewise finds support in the Fourth Circuit's repeated references to the FCC's interpretation as a "regulation," the "plain meaning" of which controlled the rights and obligations of the parties. Pet. App. 13a–14a. The Fourth Circuit plainly assumed that the FCC's interpretation constitutes a "legislative rule."

That assumption was too simplistic because the distinction between interpretive and legislative rules is critical in this case. First, the Hobbs Act does not apply at all to interpretive rules. An FCC rule is an "order" reviewable under 47 U.S.C. § 402(a), and hence subject to the Hobbs Act's provisions, only if it has the "force of law" in the sense that it "sets a standard of conduct for all to whom its terms apply." *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942). Interpretive rules do not have that effect.

Second, the distinction between interpretive and legislative rules goes directly to the Fourth Circuit's perception that there was something untoward about the

district court's refusal to automatically apply the interpretation set forth in the 2006 Order. In the Fourth Circuit's view, the Hobbs Act barred the district court from declining to treat that interpretation as establishing the rule of decision. But there is no such disconnect if the FCC's interpretation is properly regarded as an interpretive rule or general policy statement because "a court is not required to give effect to an interpretative regulation."[8] *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977).

The FCC's discussion of "offers for free goods and services and informational messages" bears all of the hallmarks of a non-binding interpretive rule or policy statement because it serves to clarify the agency's interpretation of the TCPA and expectations for its own enforcement practices. It does not impose new commands upon private parties or courts.

As noted, the "critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Perez*, 135 S. Ct. at 1204. The Commission's discussion concerning "offers for free goods and services and informational messages" does

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[8] Of course, even if the district court were bound by the FCC's rule, PDR's position remains that the district court's interpretation of that rule was correct, in light of the text of the TCPA and the plain language of the 2006 Order itself. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *Sandusky*, 788 F.3d at 223 (holding that the "unambiguous terms" of the TCPA apply only to faxes with "commercial components" (internal quotation marks omitted)); *cf. Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (holding that advocating for a "purposeful but permissible reading of the regulation to bring it into harmony with the statute" is not tantamount to "seek[ing] an implicit declaration that the ... regulations were invalid as written" (internal quotation marks and ellipses omitted)).

just that, and nothing more. It explains the Commission's general understanding that the TCPA regulates commercial fax messages while leaving "noncommercial speech" unregulated. 21 FCC Rcd. at 3810 n.156. It outlines the Commission's view that fax messages that "promote goods or services" qualify as "unsolicited advertisements," even if the commercial "promot[ion]" takes on nominally "no cost" features. *Id.* at 3814. It introduces the Commission's understanding that "informational messages" are an aspect of the "noncommercial speech" that the TCPA leaves unregulated. *Id.* at 3814 & n.156. And, critically, it lays out a non-exhaustive lists of factors the Commission expects to "consider" on a "case-by-case basis" in distinguishing between "informational messages," on the one hand, and "commercial" messages that "promote goods or services," on the other. *Id.* at 3814–15 & n.187. The FCC's interpretation thus advises the regulated community on how the Commission "will exercise its broad enforcement discretion ... under some extant statute or rule." *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015) (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)).

Furthermore, unlike a "legislative rule," nothing in the relevant paragraphs of the FCC's order purports to create new, binding obligations for private parties or to alter anything in a prior Commission regulation. *See United States v. Picciotto*, 875 F.2d 345, 347–48 (D.C. Cir. 1989) (explaining that interpretive rules "merely restate existing duties, rather than creat[e] new duties"). This is in sharp contrast to many other sections of the 2006 Order, which made amendments to the Commission's prior legislative rules and thus were presaged by a notice of proposed rulemaking and reflected in amendments to codified regulations. For example, just a few pages prior to the "offers for free

goods and services and informational messages" discussion, the Commission noted that it had "sought comment in the [Junk Fax Prevention Act] NPRM" on how to allocate responsibility for transmission of unsolicited faxes between third party agents or broadcasters, on the one hand, and the requesting entity, on the other. 21 FCC Rcd. at 3807. The Commission then answered that question by concluding that "the sender is the person or entity on whose behalf the advertisement is sent," *id.* at 3808; "adopt[ed] a definition of sender for purposes of the facsimile advertising rules," *id.*; and codified just such a definition in its rules, *see* 47 C.F.R. § 64.1200(f)(8) (2006) ("The term *sender* for purposes of paragraph (a)(3) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement"). The Commission did nothing like this with respect to "offers for free goods and services and informational messages." It said only that it was responding to petitions for clarification and reconsideration that had been filed in response to the 2003 order, 21 FCC Rcd. at 3814 nn.185 & 187, 3815 n.188, and offered views of the law that bore on the issues raised by the petitioners. The Commission did not codify its views in its TCPA regulations.

For all these reasons, the Commission's interpretation of 47 U.S.C. § 227(a)(5), as applied to "offers for free goods and services and informational messages," is properly categorized as a non-binding interpretive rule or policy statement. Accordingly, the Commission's interpretation was not reviewable under 47 U.S.C. § 402(a) or the Hobbs Act, and the district court's review of the Commission's interpretation raised no jurisdictional questions respecting the Hobbs Act. Because the Commission's interpretation is not

binding, the district court was not obliged to apply it, and was instead free to interpret the TCPA in light of its text and context and—correctly—to grant PDR's motion to dismiss Carlton & Harris's statutory damages claims.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

28 U.S.C. § 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture or the Secretary of Transportation;

(C) the Administration, when the order was entered by the Maritime Administration;

(D) the Secretary, when the order is under section 812 of the Fair Housing Act; and

(E) the Board, when the order was entered by the Surface Transportation Board.

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

28 U.S.C. § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

28 U.S.C. § 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

28 U.S.C. § 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

28 U.S.C. § 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

28 U.S.C. § 2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

28 U.S.C. § 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate

stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.

28 U.S.C. § 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(2) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

28 U.S.C. § 2351. Enforcement of orders by district courts

The several district courts have jurisdiction specifically to enforce, and to enjoin and restrain any person from violating any order issued under section 193 of title 7.

47 U.S.C. § 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

* * *

5 U.S.C. § 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

47 U.S.C. § 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

* * *

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

* * *

REGULATORY APPENDIX

Federal Communications Commission (F.C.C.)

Report and Order and Third Order
on Reconsideration

IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

CG Docket No. 02-278

FCC 15-24

JUNK FAX PREVENTION ACT OF 2005

CG Docket No. 05-338

FCC 06-42

Adopted: April 5, 2006

Released: April 6, 2006

By the Commission:

* * *

4. Offers for Free Goods and Services and Informational Messages

52. We conclude that facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements un-

der the TCPA's definition.[185] In many instances, "free" seminars serve as a pretext to advertise commercial products and services. Similarly, "free" publications are often part of an overall marketing campaign to sell property, goods, or services. For instance, while the publication itself may be offered at no cost to the fascimile recipient, the products promoted within the publication are often commercially available. Based on this, it is reasonable to presume that such messages describe the "quality of any property, goods, or services."[186] Therefore, facsimile communications regarding such free goods and services, if not purely "transactional," would require the sender to obtain the recipient's permission beforehand, in the absence of an EBR.

53. By contrast, facsimile communications that contain only information, such as industry news articles, legislative updates, or employee benefit information, would not be prohibited by the TCPA rules. An incidental advertisement contained in a newsletter does not convert the entire communication into an advertisement.[187] Thus, a trade organization's newsletter

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185 * * *

186 * * *

187 *See* Air Conditioning Contractors Petition for Reconsideration at 2-3, filed August 12, 2003. In determining whether an advertisement is incidental to an informational communication, the Commission will consider, among other factors, whether the advertisement is to a *bona fide* "informational communication." In determining whether the advertisement is to a bona fide "informational communication," the Commission will consider whether the communication is issued on a regular schedule; whether the text of the communication changes from issue to issue; and whether the communication is directed to specific regular recipients, *i.e.*, to paid subscribers or to recipients who have initiated membership in the organization that sends the

sent via facsimile would not constitute an unsolicited advertisement, so long as the newsletter's primary purpose is informational, rather than to promote commercial products. We emphasize that a newsletter format used to advertise products or services will not protect a sender from liability for delivery of an unsolicited advertisement under the TCPA and the Commission's rules. We will review such newsletters on a case-by-case basis should they be brought to our attention.

54. Finally, we conclude that any surveys that serve as a pretext to an advertisement are subject to the TCPA's facsimile advertising rules.[188] The TCPA's definition of "unsolicited advertisement" applies to any communication that advertises the commercial availability or quality of property, goods or services, even if the message purports to be conducting a survey.[189]

* * *

---

communication. We may also consider the amount of space devoted to advertising versus the amount of space used for information or "transactional" messages and whether the advertising is on behalf of the sender of the communication, such as an announcement in a membership organization's monthly newsletter about an upcoming conference, or whether the advertising space is sold to and transmitted on behalf of entities other than the sender.

188 * * *

189 * * *

No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENT

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February 7, 2019

QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are PDR Network, LLC, PDR Distribution, LLC, and PDR Equity, LLC (collectively "PDR"), who were appellees below and defendants in the district court.

Respondent is Carlton & Harris Chiropractic, Inc. ("Carlton & Harris"), the appellant below and the plaintiff in the district court. Carlton & Harris has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF FOR RESPONDENT

Respondent, Carlton & Harris, respectfully requests that this Court dismiss this appeal as improvidently granted or, in the alternative, affirm the judgment of the United States Court of Appeals for the Fourth Circuit on the merits.

STATEMENT

On November 10, 2015, Carlton & Harris, a chiropractic clinic in West Virginia, filed this lawsuit alleging that PDR sent it and a class of others "unsolicited advertisements" in violation of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(C), and the implementing regulations issued by the Federal Communications Commission ("FCC"), 47 C.F.R. § 64.1200(a)(4), including a fax on December 17, 2013 (the "Fax").

The Fax is addressed to "Practice Manager" from "PDR Network" and offers a "FREE 2014 Physicians Desk Reference eBook." (Pet. App. 51a). Fine print at the bottom of the Fax states: "To opt-out of delivery of clinically relevant information about healthcare products and services from PDR via fax, call 866-469-8327. You are receiving this fax because you are a member of the PDR Network." (*Id.*) Carlton & Harris's Complaint seeks the relief authorized by the TCPA's private right of action, 47 U.S.C. § 227(b)(3), consisting of statutory damages of $500 to $1,500 per violation and injunctive relief. (Pet. App. 47a–48a).

On February 5, 2016, PDR moved to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). PDR did not dispute that Carlton & Harris adequately alleged the Fax was "unsolicited"—meaning it was sent without Carlton & Harris's "prior express invitation or permission," 47 U.S.C. § 227(a)(5)—but it argued that the Fax is not an "advertisement" as a matter of law because it "does not offer anything for purchase or sale," instead offering a "free" copy of the 2014 eBook. (Pet. App. 33a).

On March 4, 2016, Carlton & Harris filed its opposition to the motion to dismiss, arguing that the FCC issued a final order in 2006 interpreting the term "unsolicited advertisement" in 47 U.S.C. § 227(a)(5), and ruling that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." (Pet. App. 49a; *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3814 ¶ 52 (Apr. 6, 2006) ("2006 Order")). Carlton & Harris explained that the FCC found that faxes offering free goods or services are "[i]n many instances" and "often" a mere "pretext" to further advertising or part of an "overall marketing campaign," and so it is "presume[d] that such messages describe the 'quality of any property, goods, or services,'" under 47 U.S.C. § 227(a)(5). (*Id.*)

Carlton & Harris argued that (1) the FCC's ruling is binding in district courts under the Hobbs Act, 28

U.S.C. § 2342(1), which provides that "exclusive jurisdiction" to "determine the validity of" a final order of the FCC lies in the court of appeals; and (2) that the plain language of the 2006 Order states that a fax offering free goods or services, like the Fax offering a free PDR e-book, is an "advertisement," and thus subject to the TCPA and the FCC regulations. (Pet. App. 39a–40a). Carlton & Harris argued that, to the extent PDR was arguing the district court should not accept the FCC's interpretation on the basis that it is inconsistent with the statute, the rule could not be challenged outside of a Hobbs Act petition. (ECF No. 28, Pl.'s Resp. Mot. Dismiss at 3).

On March 18, 2016, PDR filed its reply in support of its motion to dismiss, arguing that the Hobbs Act was irrelevant because it was "not asking [the] Court to ignore the 2006 Order, . . . or suggesting that it should decline to 'adopt' FCC regulations on the basis they are 'unreasonable.'" (ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 3). To the contrary, PDR insisted that it was "ask[ing] the Court to apply the [FCC] ruling," but to "interpret" it to mean that a fax offering free goods or services must be a "pretext" in fact to be an advertisement, rather than creating a *per se* rule, as Carlton & Harris argued. (*Id.* at 2).

On September 30, 2016, the district court granted PDR's motion to dismiss. First, the district court held that because the statutory definition of "advertisement" is "clear," it need not "defer to" the "FCC's interpretation of the TCPA" under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843

(1984). (Pet. App. 40a). The district court reasoned that the statutory definition unambiguously requires a fax to have a "commercial aim" to be an advertisement, and so it would "decline[] to defer to the FCC's interpretation." (Pet. App. 42a).

Second, the district court held that, "even if the Court were to defer to the FCC's interpretation," the 2006 Order states that a fax must "promote" free goods or services to be an advertisement, and *promote* has "an explicit commercial nature," which it concluded was lacking in the Fax offering the free PDR e-book, making it not an "advertisement" under the district court's interpretation of the 2006 Order. (Pet. App. 40a–41a).

Carlton & Harris timely appealed to the Fourth Circuit, and the Fourth Circuit vacated the district court's dismissal. (Pet. App. 18a). The Fourth Circuit's decision is reported at *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018).

First, the Fourth Circuit held that "the jurisdictional command of the Hobbs Act requires a district court to apply FCC interpretations of the TCPA," and the district court had "no power to decide whether the FCC rule was entitled to deference." (Pet. App. 8a, 11a). The Fourth Circuit noted that the type of "jurisdiction-channeling" provision contained in the Hobbs Act is "nothing unique," and joined the Sixth, Seventh, Eighth, and Eleventh Circuits in holding that "[b]y refusing to defer to the FCC rule and applying

Chevron analysis instead, the [district] court acted beyond the scope of its congressionally granted authority." (*Id.* 8a–9a).

Second, having held that the 2006 Order was binding, the Fourth Circuit considered its meaning, holding that the FCC's ruling that faxes offering "free goods or services" are advertisements is "clear and unambiguous," and "if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." (*Id.* 14a). The Fourth Circuit held that "[f]rom a natural reading of the text of the regulation, we get this simple rule: faxes that offer free goods and services are advertisements under the TCPA." (*Id.*) The Fourth Circuit held "[w]e need not 'harmonize' the FCC's rule with the underlying statute, or probe the agency's rationale," and that "[b]ecause the plain meaning of the regulation is clear, our interpretive task is complete." (*Id.*)

The Fourth Circuit held that "although we do not reach the FCC's intent in enacting the rule," it was "reasonable" for the agency to classify all faxes offering free goods or services as "advertisements." (*Id.* 16a). The Fourth Circuit held the district court's focus on the word "commercial" in the statutory definition "takes too narrow a view of the concepts of commercial activity and promotion, and ignores the reality of many modern business models." (*Id.* at 17a). The Fourth Circuit reasoned that "[t]his case illustrates why the FCC may have decided to implement so broad

a rule," where Carlton & Harris's Complaint was dismissed without any discovery, where "few details of PDR Network's business model have emerged," and where "nothing in the record suggests that PDR Network is a charity" with some non-commercial motive for sending the Fax. (*Id.* 17a).

The Fourth Circuit vacated the judgment and "remand[ed] for further proceedings consistent with this opinion." (*Id.* 18a). PDR filed a petition for rehearing en banc, which was denied. (*Id.* 45a).

PDR petitioned this Court to review two questions: (1) whether the Hobbs Act requires a district court to defer to an FCC order interpreting the TCPA "even if there has been no challenge to the 'validity' of such order"; and (2) whether the Fourth Circuit properly interpreted the 2006 Order as "creat[ing] a *per se* rule" that faxes offering free goods or services "are automatically 'advertisements.'" (Pet. at iii).

On November 13, 2018, the Court entered an order stating, "[t]he petition for a writ of certiorari is granted limited to the following question: Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act."

SUMMARY OF ARGUMENT

PDR's primary argument in seeking certiorari was that there is a "circuit split" regarding the question presented. (Pet. at i–ii, 13–20). PDR's brief on the merits abandons that argument, neither mentioning

this supposed split, nor disputing the Fourth Circuit's holding that "[e]very other circuit to consider" the question presented has answered it in the affirmative. (Pet. App. 9a). To the extent this Court granted certiorari to decide a split of authority over whether a district court is required to accept the FCC's interpretation of the TCPA, this appeal should be dismissed as improvidently granted. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001).

If the Court reaches the question presented, the answer is, yes, the district court was required to accept the FCC's legal interpretation of the TCPA. But this is a strange case in which to decide that question, given that PDR never argued that the district court should *not* accept the FCC's interpretation. Rather, PDR asked the district court to "accept[]" and "apply" the FCC's order, but "interpret[]" it in PDR's favor. (Pet. at 14, 21; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 2). As PDR noted in its petition, Carlton & Harris "argued for a specific interpretation of the 2006 FCC Rule," and PDR "argued for another interpretation." (Pet. at 17). The Fourth Circuit adopted Carlton & Harris's interpretation, and this Court denied certiorari on that issue.

Because PDR never before argued that the district court should not "accept" the FCC's interpretation, it makes sense that *none* of the arguments in PDR's brief were raised below. For example, PDR's brief argues for the first time that fax advertisers cannot be expected to challenge "unlawful TCPA regulations" by

petitioning the FCC to change its rules *before* undertaking their fax campaigns (PDR Br. at 28), and that the Hobbs Act does not provide an adequate means for a party to "challenge the validity of" the FCC's interpretations *after* the faxes have been sent (*id.* at 36). These arguments were never raised below because PDR never argued that the 2006 Order was "unlawful" and expressly stated that it did not "challenge the validity of" that order. Because PDR's new arguments were "never presented to any lower court," they are "forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015).

If the Court considers PDR's new arguments, it should reject them. Defendants in TCPA actions have successfully sought relief using the Hobbs Act procedures. *See, e.g., Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018). The FCC is currently considering a petition from another TCPA defendant (Inovalon, Inc.) asking it to rule that the 2006 Order does not create a *per se* rule that faxes offering free goods or services are "advertisements." (*See* Section I.E, below). PDR did not comment on that petition, which would have given it "party aggrieved" standing allowing it to appeal from an adverse "final order" under the Hobbs Act, even without the burden of filing its own petition. *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Contrary to PDR's position, "[a] legal remedy is not inadequate" under the Administrative Procedure Act simply "because it is procedurally inconvenient" or because PDR would prefer to litigate an

issue in another forum. *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998).

In sum, the Court should dismiss this appeal as improvidently granted, or affirm the Fourth Circuit's judgment.

ARGUMENT

I. The Hobbs Act required the district court to accept the FCC's legal interpretation of the TCPA.

A. To the extent the Court granted certiorari to resolve PDR's claimed "circuit split" regarding the question presented, PDR has abandoned that argument and the appeal should be dismissed as improvidently granted.

PDR's petition argued there is a "circuit split" regarding whether the Hobbs Act requires a district court to accept the FCC's interpretations of the TCPA, claiming the Fourth Circuit's answer in the affirmative conflicts with *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218 (6th Cir. 2015), *N.B. Indus. v. Wells Fargo & Co.*, 465 Fed. App'x 640 (9th Cir. 2012), and *Holtzman v. Turza*, 728 F.3d 682 (7th Cir. 2013). (Pet. at 13–20). Carlton & Harris explained why there is no such split (Br. Opp. at 7–15), and PDR has abandoned the argument.

PDR's merits brief does not mention the circuit split it claimed existed in its petition, and it does not cite two of the cases that formed the supposed split described in its petition: the Ninth Circuit's decision in *N.B. Industries* and the Seventh Circuit's decision

in *Holtzman*. (PDR Br. at 1–50). PDR cites the Sixth Circuit's decision in *Sandusky Wellness* only to argue that the Fourth Circuit in this case *misinterpreted* paragraph 52 of the 2006 Order as creating a *per se* rule that a fax offering free goods or services is an advertisement, not to argue that there is a split in authority over whether a district court is required to accept the FCC's interpretations. (*Id.* at 26; *id.* at 47, n.8). But that question—the meaning of paragraph 52 of the 2006 Order, the second question presented in PDR's petition—is the issue on which this Court *denied* certiorari.

Thus, to the extent the Court granted certiorari to resolve the circuit split described in PDR's petition regarding whether a district court is required to accept the FCC's interpretations of the TCPA, the appeal should be dismissed as improvidently granted. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 107 (2001) (dismissing as improvidently granted, where "[i]t appeared at the certiorari stage that petitioner" was challenging one set of regulations, but petitioner's merits brief challenged a different set of regulations); *see also United States v. Int'l Bus. Machines Corp.*, 517 U.S. 843, 855 (1996) (refusing to address argument abandoned by petitioner).

B. The plain language of the Hobbs Act bars a district court from determining the validity of a "final order" of the FCC, such as the 2006 Order.

The Administrative Orders Review Act, commonly known as the Hobbs Act, provides that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1). With the addition of the Fourth Circuit's decision in this case, five circuits have unanimously held that, under the Hobbs Act, a district court has no power to question the validity of a final order of the FCC interpreting the TCPA, and must apply those interpretations in private TCPA litigation. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 686 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1539; *Leyse v. Clear Channel Broad., Inc.*, 545 Fed. App'x 444, 459 (6th Cir. 2013) ("*Leyse II*"), *cert. denied*, 135 S. Ct. 57;[1] *C.E. Design,*

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[1] The *Leyse II* decision superseded the Sixth Circuit's prior ruling in the case, which mistakenly ruled that the Hobbs Act did not bar the challenge to the regulation. *Leyse v. Clear Channel Broad. Inc.*, 697 F.3d 360, 376 (6th Cir. 2012) ("*Leyse I*"). As discussed in greater detail in Section I.E, below, the Sixth Circuit reconsidered its prior opinion only after attorneys at the FCC fortuitously happened to learn of the *Leyse I* decision and petitioned the Sixth Circuit to grant rehearing.

Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443, 445–50 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 933.

"The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). "[A] statute which vests jurisdiction in a particular court cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecommc'ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) (discussing the same Communications Act scheme). The "appropriate procedure for obtaining judicial review of the agency's disposition of [regulatory] issues [is] appeal to the Court of Appeals as provided by statute." *FCC v. ITT World Commcn's, Inc.*, 466 U.S. 463, 468 (1984).

In 2006, the FCC issued an order that, among other TCPA-related rulings, interpreted the term "unsolicited advertisement" in 47 U.S.C. § 227(a)(5) to mean that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3814 ¶ 52

(Apr. 6, 2006) ("2006 Order").[2] The FCC reasoned that, in its experience interpreting and enforcing the TCPA, such faxes are "[i]n many instances" and "often" a "pretext" to further advertising or part of an "overall marketing campaign," and so it is "presume[d] that such messages describe the '*quality* of any property, goods, or services,'" under 47 U.S.C. § 227(a)(5). (*Id.* (emphasis added)).

The Fourth Circuit held in this case that paragraph 52 of the 2006 Order means that the Fax PDR sent to Carlton & Harris offering a "free" copy of its 2014 e-Book is an "advertisement."[3] (Pet. App. 13a). As such, the Fax is subject to the statutory and regulatory rules governing fax advertisements.[4]

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[2] The FCC applies the same rule to prerecorded voice telephone calls. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 20 FCC Rcd. 3788, 3804 ¶ 39 (Feb. 18, 2005) (prerecorded "messages that promote goods or services at no cost are nevertheless unsolicited advertisements because they describe the 'quality of any property, goods or services'").

[3] The Second Circuit takes a different view, holding that paragraph 52 of the 2006 Order merely creates a "presumption" that a fax offering free goods or services is an advertisement. *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 93 (2d Cir. 2017). This Court denied certiorari on this difference of opinion, which was the second question presented in PDR's petition for certiorari. (Pet. at 1).

[4] Notably, that PDR's fax is an "advertisement," even an "unsolicited advertisement," does not necessarily mean it was unlawful. Congress amended the statute in 2005 to allow the sending of fax advertisements, even in the absence of prior express invitation or permission, provided that (1) there is an "established

PDR's brief does not dispute that the 2006 Order is a "final order" of the FCC within the meaning of 28 U.S.C. § 2342(1). (PDR Br. at 1–50). Neither PDR's petition for certiorari, nor its reply in support disputed that the 2006 Order is a "final order." (Pet. at 1–32; Reply at 1–12).[5]

PDR conceded below that the 2006 Order is a "final order," arguing that Carlton & Harris was "conflat[ing] a challenge to the 2006 Order's *validity* (which is prohibited by the Hobbs Act) with a challenge to the 2006 Order's *applicability* to the facts of this case (which remains the 'province of the courts')."[6] (PDR Appellee's Br. at 21). In reaching its decision, the Fourth Circuit relied on the fact that "[n]either party has disputed that the 2006 FCC Rule

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business relationship" between sender and recipient; (2) the sender obtained the recipient's fax number in a permissible way, including "voluntary communication" of the number by the recipient; and (3) the fax includes a compliant "opt-out notice." *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, § 2, 119 Stat. 359 (codified at 47 U.S.C. § 227(b)(1)(C)(i)–(iii)). The 2006 Order is not a "blanket ban" on faxes offering free goods or services, contrary to PDR's characterization. (PDR Br. at 11).

[5] If anything, PDR's reply concedes this point, arguing that the 2006 Order is subject to the "Hobbs Act" time limits for judicial review. (PDR Reply at 11). If the 2006 Order was not a "final order" under 28 U.S.C. § 2342(1), it would not be subject to those limits.

[6] At the district court hearing on PDR's motion to dismiss, PDR's counsel stated with respect to the issue of "whether [the 2006 Order is] dispositive," that "we don't really have a dispute on that." (ECF No. 39, Hr'g Tr., Sept. 29, 2016, at 7).

is the sort of 'final order' contemplated by the Hobbs Act." (Pet App. 7a, n.1).[7]

If there were any doubt on the question, PDR's petition for rehearing en banc did not dispute the panel's holding that the "final order" issue was uncontested, arguing that "the Hobbs Act—which provides a mechanism for judicial review of certain administrative orders—is *only* implicated if there is a challenge to the 'validity' of an agency order," and "[t]here was no such challenge here." (PDR Pet. Rehearing at 2).

Thus, at every stage in this case, PDR's position has been that the Hobbs Act does not apply here, not because the free-goods-or-services ruling in paragraph 52 of the 2006 Order is not a "final order" subject to the Hobbs Act's jurisdictional limitations, but because PDR "did not ask the District Court to set aside/ignore the FCC rule," and merely "argued for a specific interpretation" of the rule.[8] (*Id.* at 6).

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[7] One of PDR's amici, Professor Bamzai, agrees that the 2006 Order is a "final order" of the FCC under the Hobbs Act (*see* Bamzai Amicus Br. at 23), although he contends that a district court does not "determine the validity of" such an order by refusing to apply it on the basis that it conflicts with the statute, which is incorrect, as discussed in Section I.C.

[8] Again, this question—the *meaning* of paragraph 52 of the 2006 Order—is the question on which this Court denied certiorari.

C. When a district court declines to "accept" a final order of the FCC interpreting the TCPA on the basis that it conflicts with the statute, the court "determine[s] the validity of" the order in violation of the Hobbs Act.

Because the 2006 Order is a "final order" of the FCC, the only question under the Hobbs Act is whether a district court "determine[s] the validity of" such an order by refusing to "accept" it on the basis that it is inconsistent with the statute. PDR asserts that the Fourth Circuit's answer to that question in the affirmative reflects a "radical reading" of the Hobbs Act. (PDR Br. at 3). But far from being "radical," the Fourth Circuit's decision follows an unbroken line of circuit court decisions refusing to allow a party to make an end-run around the Hobbs Act in private TCPA litigation. *See Mais*, 768 F.3d at 1119; *Nack*, 715 F.3d at 686; *Leyse II*, 545 Fed. App'x at 459; *C.E. Design*, 606 F.3d at 445–50.[9]

In each of these cases, the party seeking to avoid the FCC rule at issue—sometimes the plaintiff, sometimes the defendant—argued that it was not asking the district court to "determine the validity of" the rule, but merely to "decline" to apply it, or to "harmo-

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[9] PDR conceded below that "a challenge to the 2006 Order's *validity*" is "prohibited by the Hobbs Act" (PDR Appellee's Br. at 21), and did not dispute that "[the 2006 Order is] dispositive," instead merely arguing for a different interpretation than Carlton & Harris. (ECF No. 39, Hr'g Tr., Sept. 29, 2016, at 7).

nize" it with the statute, or to "interpret" it in a manner more consistent with the statute. And in each case, the court of appeals held these were euphemisms for "determin[ing] the validity of" the rule.

In *C.E. Design*, the defendant argued its faxes were not "unsolicited" under the FCC's 1992 Order interpreting the TCPA to mean that faxes "from persons or entities who have an established business relationship ["EBR"] with the recipient can be deemed to be invited or permitted by the recipient." 606 F.3d at 445 (quoting *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8779 n.87 (Oct. 16, 1992) ("1992 Order")).[10] The plaintiff, represented by the same firm representing Carlton & Harris in this case, Anderson + Wanca, argued that the statute itself "unambiguously" states that a fax is "unsolicited" if the sender fails to obtain "prior *express* invitation or permission," and that merely having an EBR with a recipient does not constitute "express" permission to send fax advertisements to that recipient. *Id.* at 447. The plaintiff argued that, because the statute was unambiguous at "step one" of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), "there was no need for the district court to even consider" the 1992 Order. *Id.*

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[10] The faxes in *C.E. Design* were sent before Congress codified the EBR exemption (adding an opt-out-notice requirement) in the Junk Fax Prevention Act of 2005. *See C.E. Design*, 606 F.3d at 445.

The district court disagreed and granted the defendant summary judgment on the basis that there was an EBR between the parties. *Id.*

The Seventh Circuit affirmed, holding that a district court cannot simply "ignore" the FCC's interpretation on the basis that the statute is unambiguous at *Chevron* "step one." *Id.* at 447. The Seventh Circuit held the "purpose of even just the first step of the *Chevron* analysis is to determine the validity of the agency's interpretation," but "deeming agency action valid or ineffective is precisely the sort of review that the Hobbs Act delegates to the courts of appeals in cases challenging final FCC orders." *Id.* at 447–48. The Seventh Circuit held that for the district court to "ignore—or in other words, invalidate" the FCC's EBR rule would violate the Hobbs Act. *Id.* at 448.

In *Mais*, the district court granted summary judgment for the plaintiff in a TCPA case, rejecting the defendant's request to apply the ruling in the 1992 Order that the mere "provision of a cell phone number" constitutes "prior express consent" to receive autodialed voice telephone calls at that number, reasoning that the rule was "inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for 'prior express *or implied* consent.'" *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013). The district court held "Congress could have written the statute that way, but it didn't," and so "the FCC's contrary construction is not entitled to deference" under *Chevron*. *Id.* The *Mais* district court insisted it was

not "determin[ing] the validity of" the FCC's rule and was merely finding that the statute was unambiguous at *Chevron* "step one" and declining to "defer" to the rule. *Id.* at 1239.

The Eleventh Circuit reversed, holding that "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power" in violation of the Hobbs Act. *Mais*, 768 F.3d at 1119. The Eleventh Circuit held it made "no difference" that the validity of the FCC's interpretation arose "in a dispute between private parties," rather than a proceeding with the primary purpose of attacking the ruling. *Id.* It held the plaintiff was "free to ask the Commission to reconsider its interpretation of 'prior express consent' and to challenge the FCC's response in the court of appeals," but the district court was bound to enforce the ruling, even if it considered it unworthy of *Chevron* deference. *Id.* at 1119–20; *see also Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1307 (11th Cir. 2015) (district courts "may not determine the validity of FCC orders, *including by refusing to enforce an FCC interpretation*") (citing *Mais*, 768 F.3d at1114) (emphasis added).

In *Nack*, the district court entered summary judgment for the TCPA defendant, "interpreting" an FCC rule requiring "opt-out notice" on fax advertisements sent with "prior express invitation or permission," 47 C.F.R. § 64.1200(a)(4)(iv), as not applying to faxes sent with express permission, reasoning that "as a whole," the TCPA applies "only to unsolicited faxes," i.e., faxes sent without prior express permission. *Nack*

v. Walburg, 2011 WL 310249, at *4–5 (E.D. Mo. Jan. 28, 2011). The district court insisted it was not "enjoining, setting aside, annulling, or suspending" the FCC rule in violation of the Hobbs Act, but "interpreting" it in a manner "consistent with the TCPA, and with Congress' and the FCC's stated intent to prevent 'unsolicited' facsimile advertisements." *Id.* at *5–6.

On appeal, the FCC filed an amicus brief arguing that the defendant's "interpretive" challenge to the rule was barred by the Hobbs Act and that, to obtain judicial review of the rule, the defendant must petition the FCC and then (if the petition was denied) seek review in the court of appeals. *Nack*, 715 F.3d at 686 n.2. The Eighth Circuit agreed with the FCC and reversed, holding the district court lacked jurisdiction to "interpret" the regulation away as contrary to the statute and that the defendant must first "challenge the validity" of the regulation before the FCC to obtain judicial review. *Id.* The *Nack* defendant petitioned this Court for review, which was denied. *See* 134 S. Ct. 1539.[11]

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[11] As discussed in Section I.E, below, the defendant in *Nack* also filed a petition with the FCC challenging the validity of the regulation, which led to an appealable "final order" from the FCC in 2014, which the *Nack* defendant then successfully challenged in the D.C. Circuit in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043. After this Court denied certiorari in *Bais Yaakov*, the plaintiff in *Nack* voluntarily dismissed the case. *Nack v. Walburg*, No. 10-cv-478 (E.D. Mo.), Order Granting Voluntary Dismissal, ECF No. 71 (Apr. 11, 2018).

In *Leyse*, the district court dismissed a TCPA plaintiff's claim arising out of a telephone call from a local radio station, holding the FCC issued an order in 2003 exempting such calls from the TCPA's definition of "advertisement," and that the plaintiff's challenge to the validity of that exemption was barred by the Hobbs Act. 545 Fed. App'x at 459. The Sixth Circuit's initial opinion affirmed, but in doing so, it examined the validity of the FCC's 2003 order, holding "the FCC decision lies comfortably within the statutory scheme," and that this determination was not barred by the Hobbs Act because the action was not a "proceeding to enjoin, set aside, annul, or suspend" the order, since the "central object" of the litigation was not "to either enforce or undercut an FCC order." *Leyse I*, 697 F.3d at 373.

The FCC, which had of course not been a party to the case, subsequently learned of the decision in *Leyse I* and moved to intervene and petition for rehearing, which the Sixth Circuit granted. In *Leyse II*, the Sixth Circuit superseded its prior opinion to once again affirm the district court's dismissal on the basis that the call was exempted under the FCC rules, but to hold that "the Hobbs Act deprives the district court below—and this court on appeal—of jurisdiction over the argument that the exemption was invalid or should be set aside," holding, "the Hobbs Act's jurisdictional limitations are equally applicable" regardless of whether a party challenges the agency order directly or "indirectly" in a private TCPA action.

Leyse II, 545 Fed. App'x at 459 (quoting *C.E. Design*, 606 F.3d at 448).

In sum, when a district court "declines to apply" a final order of the FCC interpreting the TCPA on the basis that it is inconsistent with the statute, it "determine[s] the validity" of the order. A district court lacks subject-matter jurisdiction to make that determination under the plain language of the Hobbs Act, and the Court should affirm.

D. The Hobbs Act's jurisdictional limitations are not limited to actions against the government.

PDR argues the Hobbs Act applies only to bar "suits against the United States brought to obtain injunctive or declaratory relief from agency action." (Pet. Br. at 2). PDR argues that "[n]o other type of proceeding is mentioned in the Hobbs Act." (*Id.*) PDR did not raise this argument in the district court (ECF No. 19, Defs.' Mem. Mot. Dismiss at 1–16; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 1–12), in the Fourth Circuit (PDR Appellees' Br. at 1–40), or in its petition for certiorari or reply in support. (Pet. at 1–33; Reply at 1–12). Because this argument "was never presented to any lower court" it is "forfeited." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 397 (2015). As "a court of final review and not first view," this Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (citations omitted).

PDR is also mistaken that the Hobbs Act applies to only a certain "type of proceeding." The Hobbs Act

does not refer to any type of "proceeding." It refers to a type *of court* (i.e., the court of appeals), and the type *of actions* that court has jurisdiction to undertake (i.e., the "exclusive jurisdiction" to "determine the validity of" final FCC orders). Rather, as the Fourth Circuit held in this case (Pet. App. 10a), and as every circuit court to address this question has held, it makes "no difference" whether a challenge to an FCC order arises in a private TCPA action or in an action with the express purpose of attacking the rule. *C.E. Design*, 606 F.3d at 448; *Mais*, 768 F.3d at 1119; *Nack*, 715 F.3d at 686; *Leyse*, 545 Fed. App'x at 456; *see also Vonage Holdings Corp. v. Minnesota PUC*, 394 F.3d 568, 569 (8th Cir. 2004) (holding "[n]o collateral attacks on the FCC Order are permitted" in private litigation, since "[t]he case before us is not a Hobbs Act petition for review.").

PDR cites 28 U.S.C. §§ 2342 and 2349 for the proposition that the Hobbs Act channels "certain kinds of 'proceedings' and 'judgment[s]' to the courts of appeals." (PDR Br. at 14). Although the word "judgment" is from § 2349, PDR's quotation of the word "*proceedings*" is mysterious. That word does not appear in § 2342, nor in § 2349. The Hobbs Act simply does not say what PDR wants it to say; it is not limited to certain types of "proceedings."

PDR is correct that Section 402(a) of the Communications Act states that a "proceeding to enjoin set aside, annul, or suspend any order of the Commission" shall be brought according to the Hobbs Act pro-

cedures, 47 U.S.C. § 402(a), but that is entirely consistent with the reading of the Hobbs Act that only the court of appeals has jurisdiction to determine the validity of a "final order" of the FCC. There are many statutes that refer to the Hobbs Act in this manner. *See, e.g.*, 8 U.S.C. § 252(a)(1) (stating "final order[s] of removal" of the Board of Immigration Appeals are subject to review under the Hobbs Act), *cited in Mata v. Lynch*, 135 S. Ct. 2150, 2154 (2015).

Contrary to PDR's argument, this Court has applied the Hobbs Act in a private lawsuit that was not a "suit against the United States." In *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 322 (1981), this Court held the Hobbs Act precluded a private lawsuit against a railroad for damages arising from the abandonment of a branch line. The railroad had obtained an order from the Interstate Commerce Commission ("ICC")—today, the Surface Transportation Board, *see* 28 U.S.C. § 2342(5)—granting it permission to abandon the line. *Id.* A brick manufacturer who used the line to ship its goods filed suit in Iowa state court under Iowa statutes and common law, seeking damages. *Id.* The plaintiff did not seek to enjoin, set aside, or determine the validity of the ICC's abandonment order, or even "mention[] the word 'abandonment,'" which this Court held was mere "artful pleading" attempting to avoid the Hobbs Act. *Id.* at 324.

The Court held the shipper "made no attempt to comply with the provisions of the Interstate Com-

merce Act regarding judicial review of the Commission's decision." *Id.* at 316, 322 (citing 28 U.S.C. § 2342(5)). The Court held "[t]he structure of the Act thus makes plain that Congress intended that an aggrieved shipper should seek relief in the first instance from the Commission." *Id.* at 322. The Court held that its decision "does not leave a shipper in respondent's position without a remedy," and "an aggrieved shipper is still free to pursue the avenues for relief set forth in the statute." *Id.* at 331.

In sum, the plain language of the Hobbs Act does not support a reading that it applies solely to actions against the government, and the Court should reject that argument.

E. PDR cannot complain that the Hobbs Act procedures are inadequate, where it has refused to avail itself of those procedures.

PDR argues that the Administrative Procedure Act ("APA"), 5 U.S.C. § 703(a), independently "compels reversal of the decision below" because the Hobbs Act does not provide PDR a "prior, adequate, and exclusive opportunity for judicial review" of the 2006 Order. (PDR Br. at 24). PDR has never before mentioned the APA in this litigation: not in this Court (Pet. at 1–33; Reply at 1–12); not in the Fourth Circuit (PDR Appellees' Br. at 1–40); and not in the district court (ECF No. 19, Defs.' Mem. Mot. Dismiss at 1–16; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 1–12). Understandably, neither court below discussed the APA, and because this argument "was never presented to

any lower court" it is "forfeited." *OBB Personenverkehr AG*, 136 S. Ct. at 397.

PDR's arguments regarding the adequacy of the Hobbs Act procedures are also not ripe. PDR has never petitioned the FCC to challenge the free-goods-or-services rule, and it cannot complain that a remedy is inadequate while refusing to avail itself of that remedy. If the "practical problems" PDR complains of are serious enough to warrant this Court's review, then it should reserve that question "for a case in which it is not hypothetical," *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *i.e.*, a case in which the petitioner has availed itself of those allegedly inadequate review mechanisms.

PDR is also mistaken that the Hobbs Act does not afford an adequate means to challenge FCC rules. A business like PDR considering a mass-faxing campaign in the United States always has the option of consulting with experienced TCPA counsel before sending its faxes. Contrary to PDR's assertion, any competent TCPA lawyer would have advised PDR that sending faxes offering free copies of its e-Book would, at the very least, be risky, given the FCC's ruling that faxes offering "free publications" are "advertisements," and that it should petition the FCC to either change the rules or, if counsel determined the 2006 Order was ambiguous, clarify whether the contemplated fax campaign would be permitted. *See Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir.1958), *cert. denied*, 361 U.S. 813 (1959). A statutory remedy provided by Congress is not inadequate

where it is the party's "own inaction which foreclosed review." *Sable Commc'ns of Cal., Inc. v. FCC*, 827 F.2d 640 (9th Cir. 1987); *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003); *Town of Sanford v. United States*, 140 F.3d 20, 23 (1st Cir. 1998) ("A legal remedy is not inadequate for purposes of the APA because it is procedurally inconvenient for a given plaintiff, or because plaintiffs have inadvertently deprived themselves of an opportunity to pursue that remedy.").

Even after a defendant has been sued, the Hobbs Act affords an adequate means to challenge the FCC's interpretations. As the U.S. Chamber of Commerce recognizes in its amicus brief, "[l]itigants have options, even after the Hobbs Act period, in which to bring substantive challenges to agency rules." (Brief of U.S. Chamber of Commerce at 5). The Chamber explains that a party may at any time "fil[e] a petition for amendment or rescission of the agency's regulations, and challeng[e] the denial of that petition" in the court of appeals. (*Id.*, n.3 (quoting *Edison Elec. Inst. v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992)).[12]

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[12] The Chamber of Commerce asks this Court to rule that the Hobbs Act allows TCPA defendants to challenge the validity of FCC rules in the district court, but bars TCPA plaintiffs from doing the same. The Hobbs Act's language that the court of appeals has "exclusive jurisdiction" to "determine the validity of" an FCC order cannot mean completely contradictory things depending on whether it is a defendant seeking to challenge an FCC order or a plaintiff seeking to challenge an FCC order.

PDR complains that petitioning the agency and then taking a Hobbs Act appeal is "cumbersome at best and almost always illusory" and that the 2006 Order was "effectively unreviewable" by the time this case was filed in 2015. (PDR Br. at 17).[13] But PDR glosses over *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018), a recent case in which TCPA defendants used the Hobbs Act to obtain relief from a different part of the 2006 Order by petitioning the FCC and then challenging the denial of their petitions in the court of appeals, which they did long after the 60-day period for direct review of the 2006 Order expired.

The *Bais Yaakov* litigation was related to the Eighth Circuit's decision in *Nack*, 715 F.3d at 686. Following the Eighth Circuit's 2013 decision that the Hobbs Act required the district court to apply the FCC's 2006 regulation requiring opt-out notice on fax advertisements sent with the recipient's prior express permission, 47 C.F.R. § 64.1200(a)(4)(iv), the *Nack* defendant obtained a stay of the district court litigation, *see Nack v. Walburg*, No. 10-cv-478, 2013 WL

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[13] PDR argues that "for orders promulgating rules of general applicability, a party may not be 'aggrieved' in any legal or practical sense until it faces a judicial enforcement action," and "[i]n that circumstance, section 703 preserves the right to judicial review," citing this Court's decisions in *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), and *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984). (PDR Br. at 29–30). But PDR *has* a right to judicial review. It simply must obtain that review by following the Hobbs Act, and not in a district court.

4860104, at *1 (E.D. Mo. Sept. 12, 2013), and, along with over a dozen other TCPA defendants, petitioned the FCC challenging the validity of the rule. After a notice-and-comment period, the FCC issued a final order on October 30, 2014, granting in part and denying in part the petitions, ruling in relevant part that the FCC had statutory authority to issue the opt-out regulation in the 2006 Order. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 29 FCC Rcd. 13998 (Oct. 30, 2014) ("2014 Order").

Multiple "aggrieved parties," both TCPA defendants and TCPA plaintiffs (several of whom were represented by undersigned counsel, Anderson + Wanca), filed Hobbs Act petitions for review from the 2014 Order, which were consolidated in *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir.). In that consolidated appeal, the D.C. Circuit reviewed the 2014 Order and vacated it on the basis that the FCC lacked statutory authority to issue the regulation requiring opt out notice on faxes sent with express permission in the 2006 Order. *Bais Yaakov*, 852 F.3d at 1082.

After this Court denied certiorari in *Bais Yaakov*, *see* 138 S. Ct. 1043, the plaintiff in *Nack*, who had conceded that the defendant obtained his prior express permission to send fax advertisements and was suing solely on the opt-out-notice violation, voluntarily dismissed the case in the district court.[14] *See Nack*

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[14] Other private TCPA actions against petitioners in *Bais Yaakov* that were voluntarily dismissed include *St. Louis Heart Ctr.*

v. Walburg, No. 10-cv-478 (E.D. Mo.), Order Granting Voluntary Dismissal, ECF No. 71 (Apr. 11, 2018).[15] As the *Bais Yaakov* litigation makes clear, the petitioners in those cases obtained the relief they sought: they were no longer subject to the regulation requiring opt-

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v. Gilead Palo Alto, Inc., No. 13-cv-958 (E.D. Mo.), Order Granting Voluntary Dismissal, ECF No. 65 (July 17, 2018). In several other TCPA actions against *Bais Yaakov* petitioners, the plaintiff disputes that the defendant actually obtained prior express permission and is continuing to sue for the sending of *unsolicited* advertisements lacking an opt-out notice complying with the statute, 47 U.S.C. § 227(b)(1)(C). *See Physicians Healthsource, Inc. v. Masimo Corp.*, 14-cv-00001 (C.D. Cal.); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 12-cv-01208 (D. Conn.); *Med. West Ballas Pharm., Ltd. v. Anda Inc.*, No. 08SL-CC00257 (Cir. Ct. St. Louis Cty., Mo.).

[15] Another recent Hobbs Act appeal came before the D.C. Circuit from the FCC's 2015 Order, *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (July 10, 2015), which decided multiple issues regarding the rules governing voice telephone calls and text messages, including interpreting the statutory term "automatic telephone dialing system" ("ATDS"). *See ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Numerous petitioners in that appeal were defendants in private TCPA litigation. The D.C. Circuit vacated in part and affirmed in part, *id.*, and the matter is pending before the FCC on remand. As PDR would have it, however the FCC rules on remand, courts hearing future TCPA actions will be free to apply their own interpretations of the statute, without being required to accept the FCC's interpretation. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018) (holding "equipment that ma[kes] automatic calls from lists of recipients" is "covered by the TCPA" definition of ATDS).

out notice on faxes sent with prior express permission, which was issued years earlier in the 2006 Order.[16]

Although PDR chose not to petition the FCC, there are three relevant petitions currently pending before the FCC filed by defendants in private TCPA actions seeking declaratory rulings regarding the meaning of the term "advertisement" in the fax context. *See Best Doctors, Inc. Petition for Declaratory Ruling*, CG Docket Nos. 02-278 (filed Dec. 14, 2018) (seeking declaratory ruling that fax asking physician to confirm contact information for inclusion in a "Best Doctors in America" publication was not an advertisement);[17]

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[16] The more difficult question is whether TCPA defendants who were *not* parties to the *Bais Yaakov* appeal remain subject to the regulation, or whether the regulation was "invalidated" universally, such that it cannot be enforced against any defendant. Three circuit courts of appeal have ruled on this question, each holding that the 2006 opt-out regulation could not be enforced against the defendant, even though the defendant was not a party to *Bais Yaakov*. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1284 (2018); *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 930 (9th Cir. 2018), *petition for cert. filed*, No. 18-987 (Jan. 25, 2019); *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 289–91 (7th Cir. 2018), *petition for rehearing en banc filed*, Nos. 17-3067 & 17-3506 (Jan. 4, 2019). This Court denied certiorari on that question in *Sandusky Wellness v. ASD*, 138 S. Ct. 1284, and the question is not presented in this case because no Hobbs Act appeal has been filed (let alone decided) challenging the free-good-or-services rule.

[17] *Available at* https://ecfsapi.fcc.gov/file/1214143237261/Best%20Doctors%20-%20Petition%20for%20Declaratory%20Ruling%20sent%2012-14-18.pdf.

Petition of Inovalon Inc. for Expedited Declaratory Ruling Clarifying Unsolicited Advertisement Provision of Telephone Consumer Protection Act & Junk Fax Prevention Act, CG Docket No. 02-278 (Feb. 19, 2018) ("Inovalon Petition") (seeking declaratory ruling that fax offering "no cost" medical-records services was not an advertisement);[18] *Petition of M3 USA Corporation for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Mar. 20, 2017) (seeking declaratory ruling that fax asking recipients to participate in a survey were not advertisements).[19]

One of those petitions, the Inovalon Petition, seeks a declaratory ruling that faxes offering "no cost" medical recordkeeping services are not "advertisements." (Inovalon Petition at 1). The Inovalon Petition argues that the language in paragraph 52 of the 2006 Order means that a fax offering free goods or services is an advertisement *only if* it is in fact a "mere pretext" to advertisement, and is not a *per se* rule that a fax offering free goods or services is an advertisement. (*Id.* at 7).

The Inovalon Petition was filed February 20, 2018, and three days later (the same day the Fourth Circuit issued its opinion in this case), the FCC issued a Pub-

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[18] *Available at* https://ecfsapi.fcc.gov/file/1021917486065/2018.2.19%20FCC%20Petition.pdf.

[19] *Available at* https://ecfsapi.fcc.gov/file/10321896504076/M3%20Petition%20for%20Declaratory%20Ruling.pdf.

lic Notice seeking comments on the petition. *Consumer & Governmental Affairs Bureau Seeks Comment on Inovalon, Inc. Petition for Declaratory Ruling Under the Tel. Consumer Prot. Act & Junk Fax Prevention Act*, CG Docket No. 02-278, 2018 WL 1100910 (CGAB Feb. 23, 2018). The Public Notice advised any "interested parties" to file comments on the Inovalon Petition by March 26, 2018, and reply comments by April 10, 2018. (*Id.*)

On March 26, 2018, interested parties filed comments on the Inovalon Petition. For example, M3 Corporation, a defendant in a TCPA action, filed comments in support of the Inovalon Petition.[20] In addition, Eric B. Fromer Chiropractic, Inc. ("Fromer"), the plaintiff in the private TCPA action against Inovalon, filed comments in opposition.[21] Fromer is represented by undersigned counsel, Anderson + Wanca. Fromer's comments argue that the requested declaratory ruling is contrary to the free-goods-or-services rule in the 2006 Order, and that this "prophylactic" rule is "reasonable and appropriate to prevent fax advertisers from evading the TCPA." (Fromer Comments at 1, 4).

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[20] *Comments of M3 USA Corp.*, CG Docket No. 02-278 (Mar. 26, 2018), *available at* https://ecfsapi.fcc.gov/file/10326116073256/Inovalon%20-%20FCC%20Comments%20M3%2003262018.pdf.

[21] *Available at* https://ecfsapi.fcc.gov/file/10326103825518/File%20Final.pdf.

On September 5, 2018, Inovalon notified the FCC that the district court hearing the private TCPA action against it had stayed the case pending the FCC's ruling on the Inovalon Petition.[22] On November 28, 2018, Inovalon notified the FCC that this Court had granted certiorari in this case "limited solely to the question of whether the Fourth Circuit correctly concluded that deference to the FCC interpretation is automatic."[23]

PDR did not file comments in response to the FCC's Public Notice seeking input on the Inovalon Petition, nor participate in any way before the FCC. If PDR had filed comments on the Inovalon Petition, that would have given PDR standing to file a Hobbs Act appeal from any adverse "final order" of the FCC because "commenting on a petition in agency proceedings" will "confer 'party aggrieved' status on a litigant whose position the agency rejected." *ACA Int'l*, 885 F.3d at 711.

The closest PDR's brief comes to explaining why PDR refused to follow the path laid out by Congress

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[22] *See Ex Parte Notice of Stay Pending FCC Decision*, CG Docket No. 02-278 (Sept. 5, 2018), ***available at*** https://ecfsapi.fcc.gov/file/10905126100197/2018.9.5%20FCC%20Ex%20Parte%20re%20Motion%20to%20Stay.PDF

[23] *Ex Parte Notice: Scope of Granted Certiorari in JFPA case*, CG Docket No. 02-278 (Nov. 28, 2018), ***available at*** https://ecfsapi.fcc.gov/file/1128157123148/Inovalon%20Ex%20Parte%20re_%20PDR%20Networks%20Certiorari.PDF.

in the Hobbs Act is PDR's speculation that *if* it had gone to the FCC, the district court in this case might decline to stay the case, or the FCC proceedings could "drag on for years."[24] (PDR Br. at 37). The Court should not answer these hypothetical questions. PDR has never sought a stay from the district court, has never indicated any interest in petitioning the FCC, and has not even filed comments on other relevant petitions pending before the FCC. These questions are "appropriately reserved for a case in which [they are] not hypothetical." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016).

PDR's arguments are also mistaken. District courts routinely grant stays of TCPA litigation while the defendant petitions the FCC, as in *Nack* and the litigation against Inovalon. *See also, e.g., Comprehensive Health Care Sys. Of the Palm Beaches, Inc. v. M3 USA Corp.*, No. 16-cv-80967, 2017 WL 4868185, at *1-*3 (S.D. Fla. Oct. 6, 2017); *Degnen v. Dental Fix RX, LLC*, No. 4:15-cv-1372, 2016 WL 4158888, at *3 (E.D. Mo. Aug. 5, 2016). PDR cites a handful of district court decisions denying stays (PDR Br. at 37–38), but they involved situations where "discovery in this case will be required regardless of the outcome" because issues raised in the Hobbs Act proceeding would not be dispositive. *Edwards v. Oportun, Inc.*, 193 F. Supp. 3d 1096, 1101 (N.D. Cal. 2016); *Lathrop v. Uber*

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[24] Of course, the real reason PDR never petitioned the FCC is because it never challenged the validity of the FCC's rule, and argued the district court should "accept[] the rule as 'valid,'" and "interpret[]" it in PDR's favor. (Pet. at 14).

Techs., Inc., 2016 WL 97511, at *5 (N.D. Cal. Jan. 8, 2016); *see also Hofer v. Synchrony Bank*, 2015 WL2374696, at *2–3 (E.D. Mo. May 18, 2015) (denying stay where the plaintiff's "claim would not be affected by an FCC decision").

PDR is correct that there is no statute *requiring* a district court to stay a private TCPA action when the defendant files an FCC petition. But that is up to Congress, which knows well how to impose a mandatory stay. *See, e.g.*, 11 U.S.C. § 362(a) (automatic stay of nearly all civil litigation against debtor after filing of bankruptcy petition); 15 U.S.C. § 78u-4(b)(3)(B) (staying "all discovery and other proceedings" pending motion to dismiss in private securities litigation). And Congress has expressly contemplated imposing deadlines for the FCC to issue public notices on petitions, and requiring the FCC to issue "guidelines (relative to the date of filing) for the disposition of petitions" for declaratory rulings, although it has not done so. *See* Federal Communication Commission Process Reform Act of 2017, H.R. 290, 115th Cong. § 2(a) (2017).

PDR argues that any relief a TCPA defendant could hope to obtain from petitioning the FCC and appealing a denial would do the defendant no good because it would be prospective and "not retroactive" under *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). (PDR Br. at 37). Again, PDR is mistaken. *See Manhattan Gen. Equip. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134–35 (1935) (holding that application of an amended regulation, which was

issued after the original regulation was declared invalid as *ultra vires*, to pending cases was not "retroactive" because "[a] regulation which does not [carry into effect the will of Congress] but operates to create a rule out of harmony with the statute, is a mere nullity . . . Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule."); *Dixon v. United States*, 381 U.S. 68, 75 (1965) (a decision reversing a prior incorrect administrative interpretation of a statute and applying that interpretation to pending cases "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand").

The D.C. Circuit has a line of cases dealing with this precise issue, beginning with *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959) (holding radio station could appeal FCC's denial of petition to eliminate a rule issued more than 60 days prior on the basis that the rule exceeded the FCC's statutory authority). This line of cases is best summarized in *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 197 (D.C. Cir. 1987) (Edwards, J.).

In *NLRB Union*, the Union petitioned the Federal Labor Relations Authority (the "FLRA") seeking a ruling that regulations the FLRA had issued years earlier were inconsistent with the authorizing statute. *Id.* at 193. The FLRA denied the petition, finding that the regulations were valid, and the Union appealed pursuant to 5 U.S.C. § 7123(a), which, like the Hobbs

Act, provides that a "person aggrieved" by a "final order" of the FLRA may "during the 60-day period beginning on the date on which the order was issued" seek "judicial review" in "the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia." *Id.*

The FLRA argued that the appeal was untimely because the 60-day period had expired "almost seven years" before the appeal was filed. *Id.* at 195. The D.C. Circuit rejected that argument, holding "[a]n agency's regulations may be attacked in two ways once the statutory limitations period has expired." *Id.* First, the court held, the rule may be attacked "directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them" in a Hobbs Act petition "properly brought before this court for review of further [agency] action applying it." *Id.* at 195–96.

"The second method of obtaining judicial review of agency regulations once the limitations period has run," the D.C. Circuit explained, "is to petition the agency for amendment or rescission of the regulations and then to appeal the agency's decision." *Id.* There are "three types of challenges" in such an appeal: (a) an objection to a "*procedural* infirmity," in which case the appeal is time-barred; (b) a claim that the rule suffers a "*substantive* deficiency *other than the agency's lack of statutory authority* to issue the regulation," in which case review is limited to the "*narrow*

issues as defined by the denial of the petition for rulemaking" and "does not extend to a challenge of the agency's original action in promulgating the disputed rule"; and (c) a petition claiming "that a regulation should be amended or rescinded because it *conflicts with the statute* from which its authority derives," which is "reviewable outside of a statutory limitations period." *Id.* at 196–97 (emphasis in original).[25] Since the Union's petition fell "under the third category of indirect challenges," the D.C. Circuit held, the appeal was timely and "warrants judicial consideration." *Id.* at 197.

Strangely, PDR's brief cites *Functional Music*, seemingly to suggest that it allows a challenge to the FCC's rules on the basis that they were issued without statutory authority after the 60-day period *only* in an appeal from "subsequent actions by an agency to enforce it." (PDR Br. at 27). To be clear: *Functional*

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[25] In contrast to challenges to the agency's statutory authority to issue a rule, "challenges to the *procedural lineage of agency regulations*, whether raised by direct appeal, by petition for amendment or rescission of the regulation or as a defense to an agency enforcement proceeding, will not be entertained outside the 60-day period provided by statute." *JEM Broad. Co. v. FCC*, 22 F.3d 320, 325 (D.C. Cir. 1994) (emphasis in original) (applying *NLRB Union* and refusing to consider procedural challenge to FCC order outside 60-day period for Hobbs Act appeal); *see also Nat. Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602–03 (D.C. Cir. 1981) (noting that a party who had the opportunity to seek direct review of a regulation cannot use a petition to repeal as a "back door procedural challenge[]" to challenge the procedures used to promulgate the original rule).

Music "involved an appeal from [the FCC's] refusal to reconsider its denial of a petition for rescission of the disputed regulations," not an appeal from an FCC enforcement action. *NLRB Union*, 834 F.2d at 197.

Finally, PDR cites what it claims are "comparable statutory schemes," but they do not support PDR's arguments about the Hobbs Act. PDR cites 29 U.S.C. § 655(f), which provides that a person "adversely affected" by standards issued by the Secretary of Labor "may at any time prior to the sixtieth day after such standard is promulgated" challenge the validity of the standard in the court of appeals. (PDR Br. at 31). PDR argues that the Fourth Circuit's logic "would preclude review" of these standards "in enforcement actions" brought by the government, such as *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 4, 7–9 (1980), and *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1346, 1354 (N.D. Ill. 1997). (*Id.* at 32). And PDR notes that the Exchange Act provides in 15 U.S.C. § 78y(a) & (b) that "[a] person aggrieved by a final order of" the SEC "may obtain review of the order" in the court of appeals within 60 days, which, under the Fourth Circuit's ruling, PDR argues would have "preclude[d]" the courts from considering whether particular SEC rules were valid in *United States v. O'Hagan*, 521 U.S. 642, 666–76 (1997), *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212–14 (1976), and *SEC v. Alpine Sec. Corp.*, 308 F. Supp. 3d 775, 795–96 (S.D.N.Y. 2018).

PDR is mistaken. First, it does not appear any party argued 29 U.S.C. § 655(f) or 15 U.S.C. § 78y barred review of the rules at issue in any of these

cases. Second, unlike the Hobbs Act, these statutes do not state that the court of appeals has "exclusive jurisdiction" to determine the validity of the agency's rules; they merely state that a person "may" challenge them in this manner. As this Court has specifically held with respect to 15 U.S.C. § 78y, this language "does not expressly limit the jurisdiction that other statutes confer on district courts," and "[n]or does it do so implicitly." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010).[26]

In contrast, the "statutory scheme" of the Hobbs Act displays a "fairly discernible" intent to limit jurisdiction, and the claims at issue "are of the type Congress intended to be reviewed within th[e] statutory structure." *Id.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). And, "[g]enerally, when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,'" those procedures "'are to be exclusive.'" *Id.* (quoting *Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

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[26] It is true that courts have held a defendant subject to a final order in an administrative SEC enforcement action must "proceed exclusively through" 15 U.S.C. § 78y(a)(1). *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015). But that is no different than saying PDR would be required to challenge a "final order" issued against PDR in an FCC administrative enforcement action through the Hobbs Act, which PDR admits is the case.

There is an exception where (1) "a finding of preclusion could foreclose all meaningful judicial review"; (2) the suit is "wholly collateral to a statute's review provisions"; and (3) the claims are "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212–13). The Court does not consider it a "meaningful" avenue of relief for the party to be required to "bet the farm . . . by taking the violative action" before "testing the validity of the law." *Id.* (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). But here, PDR was not required to send its fax advertisements before challenging the validity of the FCC's free-goods-or-services ruling. It could have easily filed a petition before it took the "violative action." *Id.*

PDR's assertion that the Hobbs Act does not provide an adequate means to challenge an FCC order on the basis that it was issued without statutory authority is simply incorrect.

F. PDR's new constitutional arguments fail.

PDR argues it would violate due process to require it to pursue relief under the Hobbs Act because "everyone should have his own day in court," quoting *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015). (PDR Br. at 41). The Fourth Circuit "did not address" this argument because PDR "did not raise the due process points in his briefs before that court," and this Court should "decline to consider these contentions in the first instance." *O'Hagan*, 521 U.S. at 677.

PDR is also mistaken that it is "effectively estopped" by the Hobbs Act "from raising any argument bearing on the consistency between the 2006 Order and the TCPA itself . . . ." (PDR Br. at 41). Notably, PDR has never argued that there is an "inconsistency between" the 2006 Order and the statute. If PDR had chosen to make such an argument, it would have had to do so in a court with jurisdiction to make that determination (*i.e.*, the court of appeals in a circuit in which venue is proper, 28 U.S.C. § 2342(1)). Congress is vested with virtually unfettered discretion to define the jurisdiction of federal courts, and that is all the Hobbs Act does. U.S. Const. Art. III § 1; *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (the "power to ordain and establish inferior courts" includes the power to "invest[]" or "withhold[]" jurisdiction). This includes the power to limit jurisdiction to a particular court and then only after a party has exhausted administrative remedies. *Id.*

Similarly, PDR argues the Hobbs Act violates the separation of powers, citing cases such as *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016), *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013), and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). These cases are irrelevant because the Hobbs Act does not prevent "the judiciary" from saying "what the law is" (PDR Br. at 42); it merely channels jurisdiction to declare certain agency orders unlawful to the court of appeals.

PDR's constitutional arguments are based on hyperbole about the effect of the Hobbs Act, and the Court should reject them.

II. PDR forfeited its new argument regarding "legislative rules" and "interpretive rules," and the argument fails on the merits.

PDR argues the Fourth Circuit "overlooked" a distinction between "interpretive rules" and "legislative rules." (PDR Br. at 18). The Fourth Circuit did not "overlook" any such distinction because PDR never raised it. There is no mention of "legislative" or "interpretive" rules in PDR's briefs in the district court (ECF No. 19, Defs.' Mem. Mot. Dismiss at 1–16; ECF No. 29, Defs.' Reply Supp. Mot. Dismiss at 1–12), or the court of appeals (*see* PDR Appellees' Br. at 1–40), or in PDR's petition for certiorari or reply (Pet. at 1–33; Reply at 1–12). The argument is "forfeited." *OBB Personenverkehr AG*, 136 S. Ct. at 397.

PDR's new argument also fails on the merits. First, PDR argues that "the Hobbs Act does not apply at all to interpretive rules," citing *Columbia Broad. Sys. Inc. v. United States*, 316 U.S. 407, 418 (1942), for the proposition that an "interpretive rule" does not "set[] a standard of conduct for all to whom its terms apply." (PDR Br. at 46). The *CBS* case does not draw any distinction between "interpretive" and "legislative" rules; it merely held that a broadcaster could appeal rules stating that the FCC would revoke its license if it entered into certain types of contracts prior to the revocation of the license. *CBS*, 316 U.S. at 419.

In addition, PDR provides no reason why an agency's "interpretation" of a statute cannot "set a standard of conduct" for regulated parties.[27] That is precisely what happened in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), where the court held the appeal was "governed by the Hobbs Act" in reviewing the FCC's interpretations of the statutory terms "called party" and "automatic telephone dialing system."

As the Sixth Circuit held in the TCPA context in *Leyse II*, the "fundamental flaw" in PDR's argument is that, even if an FCC ruling is "interpretive," it still "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 545 F. App'x at 453 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)). And, as in *Leyse*, Congress clearly delegated "general" authority to the FCC to "prescribe regulations to implement the requirements of this subsection." *Id.* (quoting 47 U.S.C. § 227(b)(2)); *see also Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370 (2012).[28]

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[27] PDR concedes elsewhere that the 2006 Order "promulgat[es] rules of general applicability . . . ." (PDR Br. at 29).

[28] Although not relevant to the question presented, the supposed "skyrocketing" number of TCPA cases that PDR complains of (PDR Br. at 4), considers only the number of *federal* TCPA actions, and can be explained largely by this Court's 2012 holding

Second, PDR argues that "a court is not required to give effect to an interpretative regulation," citing *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). (PDR Br. at 47). The regulation at issue in *Batterton* was not issued by an agency subject to the Hobbs Act (nor was it "interpretive"), and the Court stated, in dicta, that a court is not *required* to give effect to an interpretative regulation because "[v]arying degrees of deference" are accorded to interpretations, "based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." *Batterton*, 432 U.S. at 425, n.9. That speaks to the *standard* to be applied in reviewing the validity of an interpretation, whereas this case concerns which *court* has jurisdiction to conduct that review.

Third, PDR argues the free-goods-or-services rule does not "purport[] to create new, binding obligations for private parties or to alter anything in a prior regulation," pointing out that the FCC "did not codify its views in its TCPA regulations" at 47 C.F.R. § 64.1200. Most of the FCC's interpretations of the TCPA are not codified in the C.F.R., including the interpretation this Court applied in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016), that "under federal common-law principles of agency, there is vicarious liability for TCPA violations." (citing *In re Joint Petition Filed by Dish Network, LLC*, 28 FCC Rcd. 6574 (May

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in *Mims* that federal courts have original jurisdiction over TCPA claims. Prior to that ruling, the majority of circuits held that TCPA actions could not be filed in or removed to federal court. *See Mims*, 565 U.S. at 376.

9, 2013)). This FCC interpretation was neither "new," nor "codified" in the C.F.R., and there is no such requirement that a "final order" of the FCC be new or codified in order to be subject to the Hobbs Act.

In sum, the Court should decline to decide PDR's argument based on "legislative rules" and "interpretive rules," or reject the argument on the merits.

CONCLUSION

For the foregoing reasons, the Court should either dismiss this case as improvidently granted or affirm the Fourth Circuit's decision.

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No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTRODUCTION

As the decision below recognized, there is "nothing unique" about the Hobbs Act. Pet. App. 8a. Like many agency review provisions, it establishes a "special statutory review proceeding" that allows parties to directly challenge agency action and obtain injunctive or declaratory relief against the government. 5 U.S.C. § 703. Such statutes are common in administrative law and, as the Government concedes, "ordinarily" preserve the right of defendants in enforcement proceedings to judicial review of agency actions in that setting, where their liberty or property rights are at risk. Govt. 24. Yet Respondent and the Government argue that the Hobbs Act strips defendants of this right by requiring enforcement courts to slavishly apply legal interpretations announced in covered agency orders. Nothing in the Hobbs Act compels that disturbing and anomalous result.

First, the text of the Hobbs Act does not support it. Respondent and the Government's position depends on reading the phrase "exclusive jurisdiction ... to determine the validity" in isolation, without regard to the surrounding text, other provisions of the Hobbs Act, or background principles of administrative law. All those sources support the same conclusion: the Act does not preclude judicial review of agency legal interpretations when enforcement actions are brought in district court. Congress knows how to expressly strip enforcement courts of jurisdiction to consider legal questions, *e.g.*, 33 U.S.C. § 1369(b)(2), and did not use such language in the Hobbs Act.

Second, Section 703 of the Administrative Procedure Act ("APA") entitles PDR to judicial review in this case because the Hobbs Act provided no opportunity for re-

view that was both prior and adequate. In arguing otherwise, the Government asserts a startlingly punitive view of adequacy, under which the 60-day window to obtain direct review of a generally applicable regulation is deemed adequate for *all* parties, even those that lacked standing to sue at the time. But obviously, parties that lack standing do not have *any* opportunity to sue—let alone an "adequate" one. In junk fax class action litigation, and other settings, the Government's position would deprive countless defendants of the opportunity to obtain a judicial determination of what the statute at the heart of their case means.

Finally, Respondent and the Government ignore the unsettling implications of their estoppel-on-steroids position—including the grave constitutional concerns it would raise. One such implication is that their jurisdiction-stripping arguments apply equally to a host of other statutes that likewise create an exclusive proceeding for direct review of agency action. If the FCC gets its wish, other agencies will line up to seek the same insulation from judicial review for their own legal interpretations. But properly construed, the Hobbs Act and other like statutes permit defendants facing ruinous liability to assert the basic litigation defense that they did not violate the law.

I. THE HOBBS ACT DOES NOT PRECLUDE TCPA DEFENDANTS FROM OBTAINING JUDICIAL REVIEW OF FCC LEGAL INTERPRETATIONS.

The Government attempts to recast this case as addressing "whether a litigant in a private district-court lawsuit may collaterally attack the validity of [an order] that could have been challenged under the Hobbs Act when it was issued." Govt. 1. But the question presented is far narrower. It asks only whether the Hobbs

Act strips district courts in TCPA proceedings of jurisdiction to consider a defendant's argument that the law, properly construed, did not prohibit its conduct—let alone create exposure to massive class-action damages.

As PDR's opening brief demonstrated, the text and context of the Hobbs Act and Section 703 show that the Hobbs Act does no such thing. Respondent's and the Government's contrary arguments are unpersuasive.

A. Text and Context Require Construing the Hobbs Act More Narrowly than Respondent and the Government's Reading.

The phrase at the heart of this case—"determine the validity"—appears twice in the Hobbs Act. The Government concedes that, in § 2349(a), a judgment "determining the validity" of an order refers to a specific "type[] of relief," Govt. 21-22, but contends "determine the validity" has a different meaning in § 2342. There, it supposedly refers to authority "to settle a question or controversy about [an order's] validity," without regard to any specific form of judicial relief. Govt. 11 (internal quotation marks omitted). That is wrong.

1. The Government construes "determine the validity" based solely on dictionary definitions of each word. Govt. 11-12. It then seeks to brush aside PDR's argument that context suggests a narrower definition, by asserting that the phrase is "unambiguous[]." Govt. 20. "Whether a statutory term is unambiguous," however, "does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (plurality opinion). "[S]tatutory language must be read in context since a phrase gathers meaning from the words around it." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596 (2004) (alterations and internal quotation marks omitted).

Here, every contextual clue supports PDR's position. The Government concedes that § 2349 uses "determining the validity" to "specif[y] the type[] of relief that a court may enter." Govt. 22. The natural inference is that the phrase "determine the validity" has the same import in § 2342, because the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (internal quotation marks omitted).

The Government attempts to circumvent this interpretive rule by contending that § 2349(a) describes the "judicial relief that the Hobbs Act *authorizes*," while § 2342 defines the judicial action the Act "*forecloses*." Govt. 21-22. Both provisions, however, are phrased as affirmative grants of authority; neither expressly forecloses anything. Moreover, the contention that § 2349(a) *authorizes* judicial actions while § 2342 *forecloses* them sheds no light on whether the judicial actions discussed in the two provisions are the same or different. Again, because Congress used the same phrase twice, the "normal" interpretation is that Congress meant in both places to refer to the same actions. *Gustafson*, 513 U.S. at 570.

The Government also stresses that § 2342 "does not contain the word 'judgment,'" Govt. 22, but never explains why that difference matters. If the word's absence in § 2342 affected the meaning of "determine the validity," it would also affect the meaning of the remaining verbs listed in the string. The Government, however, never explains how the presence or absence of "judgment" would, for example, affect the understanding of "enjoin," and no answer is apparent. In both provisions, "enjoin" refers to injunctive relief that may issue as part of a judgment.

The Government likewise makes no effort to connect its construction of "determine the validity" to the adjoining terms "enjoin," "set aside," and "suspend." 28 U.S.C. § 2342. In *Direct Marketing Association v. Brohl*, this Court recognized that the words "'enjoin' and 'suspend' are terms of art in equity" that "refer to different equitable remedies that restrict or stop official action to varying degrees." 135 S. Ct. 1124, 1132 (2015). The Court thus construed the adjacent term "restrain" in the Tax Injunction Act—which provides that district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," 28 U.S.C. § 1341—to also refer to equitable relief, rejecting the broader dictionary-based construction adopted by the lower court that "restrain" means any action that might have a "negative impact" on State tax collection. 135 S. Ct. at 1132-33. The same logic applies here. Just as "enjoin," "suspend," and "set aside" denote specific remedies available in administrative litigation, "determine the validity" likewise denotes a remedy available against an agency—declaratory relief.

Finally, the Government's expansive reading of "determine the validity" conflicts with the interpretive "duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). The Government reads "determine the validity" to refer to any determination of whether an agency's action is "sound," "good," or "legally sufficient or efficacious." Govt. 12. If that were correct, the terms "enjoin," "set aside," and "suspend" in § 2342 would be superfluous because a court could not "enjoin" or "suspend" an agency action without finding that it is *not* "sound" or "good."

PDR's construction avoids such surplusage. "Enjoin," "set aside," and "suspend" each refer to a different type of injunctive relief, and "determine the validity" correspondingly refers to declaratory relief.

2. History also refutes the Government's position. The Government asserts that the phrase "determine the validity" was "obviously transplanted" from the Emergency Price Control Act (EPCA), which this Court had interpreted to give "clear indication" of a congressional intent to preclude district courts from considering the validity of war-time price regulations as a defense in civil and criminal enforcement actions. *Yakus v. United States*, 321 U.S. 414, 429-31 (1944); *see also Woods v. Hills*, 334 U.S. 210, 213-14 (1948). By supposedly taking this language from the EPCA, the Government contends, Congress "br[ought] the old soil with it," imparting to the Hobbs Act the same preclusive effect. Govt. 14 (quoting *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019)).

This argument, however, overlooks stark textual differences between the EPCA and the Hobbs Act.

Unlike the Hobbs Act, the EPCA *expressly* addressed whether Congress intended to preclude enforcement courts from considering the validity of agency action. Contrary to the Government's suggestion, the EPCA did not merely grant the Emergency Court of Appeals "exclusive jurisdiction to determine the validity of a covered order," and leave all else to implication. Govt. 13 (quoting EPCA, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33 (1942)). Rather, in the sentence immediately following the passage quoted by the Government, the EPCA stated:

> Except as provided in this section, *no court, Federal, State, or Territorial, shall have jurisdiction*

> *or power to consider the validity* of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or part, any provision of this Act authorizing the issuance of such regulations or orders ... or any provision of any such regulation, order, or price schedule....

§ 204(d), 56 Stat. at 33 (emphasis added).

The Government excises this latter sentence even though it was critical to the Court's statutory holding in *Yakus*. *See* Govt. 13-14. The Court's specific holding was that the sentence highlighted by the Government, when "*coupled with* the provision that 'no court ... shall have jurisdiction or power to *consider the validity* of any such regulation,'" was "broad enough in terms to deprive the district court of power to *consider the validity* of the Administrator's regulation or order as a defense to a criminal prosecution for its violation" *Yakus*, 321 U.S. at 429-30 (quoting § 204(d), 56 Stat. at 33) (emphases added). Thus, *Yakus* did not "authoritatively construe" the language supposedly linking the Hobbs Act and EPCA. Govt. 14. It instead construed that language *in combination* with a far broader provision expressly prohibiting other courts from "consider[ing] the validity" of covered orders—a provision the Hobbs Act conspicuously lacks.

Furthermore, Congress used the phrase "determine the validity" differently in the Hobbs Act than in the EPCA. In the EPCA, the phrase stands alone; in the Hobbs Act, it is one component in a list of terms in which every other term plainly describes a type of judicial relief. And unlike the Hobbs Act, the EPCA nowhere uses the phrase "determine the validity" in a manner that can *only* refer to a grant of declaratory relief. *See* 28 U.S.C. § 2349(a). The two statutes thus employ the same phrase, but in very different ways.

The Government errs badly in ignoring those textual and contextual differences. *See supra* 3-6.

The Hobbs Act's legislative history further undermines the Government's assertion that the Act descends from the EPCA. Neither the House nor Senate report even mentions the EPCA. Instead, these reports make clear that the Act was modeled on "the pattern established for review of orders of the Federal Trade Commission in 1914 and followed by other laws since then in relation to many other agencies," including the SEC and NLRB. H.R. Rep. No. 81-2122, at 4 (1950) (citation omitted); *see* S. Rep. No. 81-2618, at 3 (1950). Context again helps explain why. The EPCA was "adopted as a temporary wartime measure" linked to the grave "circumstances attending its enactment," *i.e.*, the nation's ramp-up to total war after Pearl Harbor. *Yakus*, 321 U.S. at 419, 431-32. There was no reason for Congress to look to an exceptional wartime statute for Hobbs Act inspiration when it had available many other ordinary direct review statutes that applied to civilian agencies in peacetime.

3. The Government's sweeping view of the Hobbs Act also lacks support in this Court's decisions interpreting the Act and its predecessor, the Urgent Deficiencies Act. None of the cases cited by the Government embraces the view that the Hobbs Act precludes defendants subjected to enforcement actions from seeking review of an agency's generally applicable legal interpretation.

To begin, *FCC v. ITT World Communications, Inc.* and *Venner v. Michigan Central Railroad* were not enforcement actions at all. Both involved obvious efforts to circumvent available direct review proceedings by seeking to enjoin not agency orders themselves, but conduct the orders blessed. In *Venner*, the Interstate Commerce Commission entered an order approving a

specific transaction between railroad companies; the next day the plaintiff sued to block that very transaction. 271 U.S. 127, 128-29 (1926). In *ITT*, the petitioner *simultaneously* sought relief under the Hobbs Act and in district court. 466 U.S. 463, 465-66 (1984). In both cases, the Court saw through the ploys, making clear that "[l]itigants may not evade" the Hobbs Act through such maneuvers. *Id.* at 468.

Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic similarly involved an attempt to evade Hobbs Act review of a party-specific order. There, a vessel owner claimed it was not liable for fees that had been approved by the Federal Maritime Commission because the fees were supposedly invalid. 400 U.S. 62, 67-68 (1970). The vessel owner argued that it had not participated in the Maritime Commission proceedings that approved the fees and therefore was not bound by the commission's order. *Id.* at 71. Tellingly, in rejecting this argument, the Court did not state that § 2342 flatly foreclosed the defendant's district court challenge. Instead, the Court emphasized that the defendant "was in fact represented before the Commission," "its interests were clearly at stake," and it "had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals," which it "chose not to do." *Id.* at 71-72. *Port of Boston* thus held that when an administrative proceeding settles specific parties' rights, those parties must seek review under the Hobbs Act and cannot circumvent it through "collateral" challenges. *Id.* at 72; *accord United States v. Ruzicka*, 329 U.S. 287 (1946).

These decisions do not support the Government's argument that the Hobbs Act precludes enforcement review of generally applicable rules. Such rules, by definition, apply to indeterminate parties, whose specific rights and interests may not have been "clearly at

stake" in the administrative proceeding that produced the rule, and who may not have had "every opportunity" to participate before the agency. *Port of Boston*, 400 U.S. at 72; *see Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1218 (D.C. Cir. 1973) ("Unlike those subject to adjudicative orders, persons who may ultimately be affected by regulations may have legitimate grounds for deciding not to join in the formulation of the rules."). Indeed, every court of appeals to consider the issue has held that when such rules are applied in subsequent enforcement proceedings, respondents can challenge the rules' validity even if the Hobbs Act's 60-day review period has run. Br. 27; *see, e.g., Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958).

The Government attempts to distinguish those decisions on the ground that they still require review to occur "in the court of appeals under the Hobbs Act procedures." Govt. 30. This misses the point: If the Government's reading of § 2342 were correct, *Functional Music* would be wrong. That is, if § 2342 actually precluded enforcement review, the *only* opportunity to challenge a rule would be in the 60 days after it issued. 28 U.S.C. § 2344. By its terms, that limitations period would apply regardless whether subsequent enforcement occurred in an administrative or judicial forum. *See id.* Once that window closed, defendants could dispute only whether a rule applied to them, not whether the rule itself is lawful. *Cf.* 42 U.S.C. § 7607(b)(2) (restricting review of certain Clean Air Act regulations in this manner). Thus, the ability under *Functional Music* to challenge an "underlying rule" in an enforcement action is further proof that the "exclusive jurisdiction" over covered orders in § 2342 is "exclusive" only as to direct review. 274 F.2d at 546. It does not displace the

review traditionally available in the event of enforcement. *Functional Music* also demonstrates that the Hobbs Act does not pursue the goal of "quick, nationwide resolution of the validity of covered agency actions," Govt. 18, at the cost of enforcement review.[1]

B. The Hobbs Act Did Not Provide a Prior, Adequate, and Exclusive Opportunity for Judicial Review of the 2006 Order.

Neither Respondent nor the Government disputes that the preclusive effect of the Hobbs Act is limited by the APA, which provides, "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Instead, they contend that the Hobbs Act gave PDR two "prior, adequate, and exclusive" opportunities for review of the 2006 Order: prior to its release, through participation in the underlying FCC proceeding; and after Respondent sued, by filing a new petition to the FCC (whether for reconsideration, a declaratory order, or rulemaking). Resp. 25-42; Govt. 24-29. They are wrong.

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[1] Nor do the reliance interests invoked by the Government justify eliminating enforcement review. The Government raises the specter of TCPA *plaintiffs* challenging FCC orders creating safe harbors on which defendants relied. Govt. 19. But even if those safe harbors were held impermissible, imposing retroactive liability on parties that relied on them would raise due process questions not presented here. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (refusing to defer to agency interpretation that would "impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced" because such deference "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires" (internal quotation marks and alteration omitted)).

1. The Government claims that PDR had an "adequate" opportunity to challenge the 2006 Order during the 60-day window after its release. Relying on the Attorney General's Manual on the Administrative Procedure Act (1947) [hereinafter *APA Manual*], the Government contends that Section 703 is "most naturally understood to incorporate the concept of 'adequacy' that the Court articulated in *Yakus*." Govt. 25. The Government appears to view that "concept of 'adequacy'" to mean that if an agency review scheme permits parties to "present their claims to the agency and then seek judicial review within a particular time," it is categorically "adequate," except (perhaps!) as applied to parties that did not exist during the direct review period. Govt. 25-26.

That cannot be correct. Even the Government concedes that Section 703 was intended to establish a "general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit." Govt. 24. Under the Government's "concept of adequacy," however, Section 703 would be meaningless. Every review scheme that offers direct review would qualify as "adequate," and so defendants could never obtain review in enforcement proceedings.

The Government misunderstands "adequacy" because it misreads *Yakus*. There, the discussion of "adequacy" was part of the Court's due process holding. In sustaining the EPCA, *Yakus* did not adopt a myopic rule that all review schemes that run through agency processes to a court are "adequate" at all times and for all purposes, as the Government suggests. Rather, it upheld the EPCA's rigid 60-day review window as adequate—even with respect to enforcement proceed-

ings—because of "the urgency and exigencies of wartime price regulation." 321 U.S. at 435. In those circumstances, the Government's regulatory interests were at their zenith, and parties could reasonably have been expected to be—and Mr. Yakus in fact was—attuned to the Government's dictates. *Id.*

The cases cited in *Yakus*'s adequacy discussion confirm that adequacy requires a real, rather than theoretical, opportunity to litigate. *Bradley v. City of Richmond*, 227 U.S. 477 (1913), for example, involved a constitutional challenge to a municipal tax scheme. The Court upheld the scheme, subject to this qualifier: "If the right to appear and be heard and to obtain a review should prove illusory, there would, under general principles of jurisprudence, remain the right to judicial review...." *Id.* at 483.

The *APA Manual* supports this same contextualized notion of "adequacy." In a passage ignored by the Government, the Manual states that in considering whether judicial review is available in enforcement proceedings under Section 703, "the extent to which the 'opportunity' for judicial review prior to the enforcement proceeding has been *waived or disregarded by the defendant in those proceedings* must also be considered." *APA Manual* 101 (emphasis added). The Manual thus anticipates decisions such as *Port of Boston*. Where an agency order specifically determines a party's particular rights and that party chooses not to pursue immediate review, it will often be fair to say that the "defendant in [the] proceedings" has "waived or disregarded" its opportunity for review.

This logic, however, does not hold for orders promulgating generally applicable rules. "[U]nlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application." *Functional Music*, 274 F.2d at 546. They apply to any party

whose conduct falls within their scope, regardless of whether the party was engaged in that activity, planning to engage in that activity, or even in existence at the time the rules were issued. The Government refuses to say whether it thinks Hobbs Act review is adequate for parties that did not exist when a rule was promulgated, *see* Govt. 28, but its argument that the 60-day window suffices for any party that did exist at that time is little better. Mere existence, after all, does not confer standing, without which a party cannot obtain direct review even if it participates in agency proceedings. *See City of Bos. Delegation v. Fed. Energy Regulatory Comm'n*, 897 F.3d 241, 248 (D.C. Cir. 2018). Unless a party can show that it was at least imminently planning to engage in the regulated activity, the path to direct review is closed. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).[2] In such circumstances, the opportunity for direct Hobbs Act review is "illusory," *Bradley*, 227 U.S. at 483, and Section 703's "adequacy" standard is properly read to permit judicial review of agency action within an enforcement proceeding.

PDR's circumstances provide a case-in-point. Nothing in the record indicates that, in 2006, PDR was engaged or planning to engage in activity subject to the 2006 Order. Therefore, even if PDR could travel back in time to December 19, 2005, review the 384 pages of the Federal Register published that day, when the FCC "open[ed] a new docket" to "seek[] comment" on its "unsolicited facsimile advertising rules," 70 Fed. Reg. 75,070, and submit comments in that proceeding,

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[2] The FCC knows this full well. It challenged the constitutional standing of both parties that sought Hobbs Act review of the 2006 Order, and prevailed as to one. *See Biggerstaff v. FCC*, 511 F.3d 178, 184 (D.C. Cir. 2007). The Government now describes that victory as resting on "procedural grounds." Govt. 5.

it still could not have sued under the Hobbs Act. An abstract interest in administrative proceedings does not create Article III standing.

For PDR, the opportunity for direct Hobbs Act review of the 2006 Order was illusory because PDR lacked statutory standing to raise such a challenge. Br. 25-27. In 2006, PDR was a stranger to the FCC proceedings, and thus not "aggrieved" by the 2006 Order. 28 U.S.C. § 2344. Nor did it know how the FCC's interpretation would one day be construed by the Fourth Circuit or any other court (many of which disagree with the Fourth Circuit's view of what the 2006 Order means). *See Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharm., Inc.*, 847 F.3d 92, 96 n.1 (2d Cir. 2017) (citing cases).[3] And once Respondent sued PDR in 2014, it was far too late for PDR to seek direct review.

The Government's primary response is "too bad." In its view, "a mode of judicial review is not inadequate simply because a particular litigant fails to satisfy the statutory prerequisites for invoking it." Govt. 26. But the cases the Government cites for this proposition involved parties whose interests were clearly and concretely at stake at a time when direct review was available. *See Port of Boston*, 400 U.S. at 71-72; *United States v. Szabo*, 760 F.3d 997, 1006-07 (9th Cir. 2014) (finding direct review adequate because the defendant

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[3] Contrary to the Government's suggestion (at 27), this Court need not blind itself to the lower courts' divergent views. That is particularly true because the Fourth Circuit's conclusion about the meaning of the FCC rule rested on its aberrant view that it was *improper* to consider the TCPA in construing the FCC's interpretation of that statute. *See* Pet. App. 14a. The Government properly declines to defend that aspect of the Fourth Circuit's analysis, Govt. Br. 27 n.6, and this Court should make clear that it is wrong.

had standing to seek pre-enforcement review of the regulation at issue *and* had specific grounds, based on his own prior conduct, to do so). Neither case supports the underpinnings of the Government's position—namely, that parties must exercise perfect foresight about how their conduct and the law might evolve, *and* must file lawsuits based on those prophecies regardless of standing.

Finally, standing considerations also rebut the suggestion (Govt. 29) that Federal Register publication creates an "adequate" opportunity for review. Mere constructive notice of agency action does not create standing to challenge it. That is, no doubt, among the reasons this Court has expressed qualms about the "severity" of a rule requiring parties to "protect themselves against arbitrary administrative action only by daily perusal of ... the Federal Register and by immediate initiation of litigation." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 283 n.2 (1978). The Government provides no reason to cast these concerns aside, especially when all that hangs in the balance is an unwanted fax.

2. The Government and Respondent also suggest that it is fine to deny review in enforcement settings, even where direct review was only hypothetically available, because the defendant may seek a kind of back-door agency review by initiating a petition for rulemaking, reconsideration, or a declaratory order.

This argument is meritless. Section 703 preserves judicial review in enforcement settings unless the defendant had a "*prior*" opportunity for review. In context, "prior" must mean "before the enforcement proceeding began"—neither Respondent nor the Government argues otherwise, and neither seeks to explain how a proceeding that begins "*after* a defendant has

been sued," Resp. 27 (emphasis added), qualifies as a "*prior*" opportunity.

Respondent and the Government also sidestep the practical inadequacies of this option. Neither acknowledges the FCC's past practice of refusing to initiate declaratory ruling proceedings in such circumstances. *See* Br. 36. Neither acknowledges that such a petition would *not* permit review of the original order; rather, the "agency action" reviewed would be the new order resolving the petition. Br. 36. And neither disputes that even if a district court agrees to stay a TCPA suit while the defendant seeks FCC review—which Respondent concedes district courts are not required to do, Resp. 36—that administrative odyssey is so lengthy and expensive that most defendants, facing ruinous class action liability, will be forced into settlement. Br. 37-39.

To be sure, there are instances where all of these hurdles were cleared and back-door review obtained. But even Respondent's primary exemplar involves a *five-year* lag from the time the defendant petitioned the FCC to the time the D.C. Circuit decided the case. *See* Resp. 28-31 (citing *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017)); Br. 36. That is neither a "prior" nor "adequate" substitute for being able to raise a legal defense before the court where the enforcement action is pending.

C. Respondent and the Government's Position Cannot Be Squared with Other Agency Review Statutes.

PDR's opening brief also explained that agency review provisions akin to the Hobbs Act have never been construed to preclude enforcement review. *See* Br. 31-33. Respondent and the Government seek to distinguish those statutes because they do not expressly vest

the courts of appeals with "exclusive jurisdiction" to "determine the validity" of agency orders. Resp. 41; Govt. 30.

This argument fails, however, because the language of those statutes is just as broad as the Hobbs Act's. The SEC's review statute covers all "review" of SEC orders, without qualification. 15 U.S.C. § 78y(b)(1). OSHA's review statute encompasses all suits "challenging the validity" and seeking "judicial review" of OSHA standards. 29 U.S.C. § 655(f). The statutes do not use the word "exclusive," but that is irrelevant. Even when "Congress has not expressly provided that the statutory procedure is to be exclusive," "specific statutory scheme[s] for obtaining review" are deemed "to be exclusive" with respect to direct review. *Whitney Nat'l Bank v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411, 420-422 (1965).

These statutes thus possess the very features that Respondent and the Government describe as distinguishing features of the Hobbs Act: They confer "exclusive" jurisdiction over "review" of agency action. Yet courts have never interpreted them to preclude judicial review of agency action in enforcement proceedings brought in district court. *See, e.g., United States v. O'Hagan*, 521 U.S. 642, 666-76 (1997).

Respondent and the Government also cannot square their interpretation with statutes like the Clean Air Act and CERCLA, which contain direct review provisions comparable to the Hobbs Act's *but also* expressly preclude review in enforcement proceedings. Br. 34-35. The Government claims these statutes shed no light on the Hobbs Act because they were enacted later in time. Govt. 23. But the Government ignores that the EPCA, enacted *before* the Hobbs Act, also contained an express preclusion provision, *see supra* 6-7. And these later enacted statutes reinforce that Congress speaks

clearly when it intends to eliminate judicial review of agency action in enforcement proceedings. The Hobbs Act contains no such clear statement—moreover, Section 703 manifests Congress's general intent to *preserve* judicial review in those settings.

D. Constitutional Avoidance Principles Favor PDR's Interpretation.

Respondent and the Government also attempt to sidestep the grave constitutional problems their reading of the Hobbs Act creates. *See* Br. 39-45. They claim PDR forfeited its avoidance arguments and that those arguments lack merit. Resp. 42-44; Govt. 31-33. Both contentions are wrong.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Accordingly, PDR may advance the constitutional-avoidance canon in support of its construction of the Hobbs Act. The canon is but another "means of giving effect to congressional intent." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).[4]

With respect to the canon's application, Respondent and the Government barely respond. They simply ignore repeated statements by this Court and others that *Yakus*-like constraints on judicial review in enforcement proceedings would raise grave constitutional concerns in peacetime settings. *See* PDR Br. 41 n.6. The purpose of the avoidance canon is to resolve disputes between competing plausible constructions of a statute in a manner that avoids confronting such concerns. PDR has demonstrated that its proposed

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[4] Respondent's other forfeiture arguments (at 8, 22, 25-26) fail for the same reason.

construction of the Hobbs Act is more than plausible. Avoidance principles thus strongly favor that construction.

II. THE FCC'S INTERPRETATION OF "UNSOLICITED ADVERTISEMENT" IS A NONBINDING INTERPRETIVE RULE.

Alternatively, the district court was not bound to follow the FCC's interpretation of "unsolicited advertisement" because that statement constitutes an interpretive rule, binding neither parties nor courts. Br. 45-50. Respondent and the Government offer no meritorious response.

First, both argue that PDR forfeited this argument by not "'disput[ing] that the 2006 FCC Rule is the sort of "final order" contemplated by the Hobbs Act.'" Govt. 33 (quoting Pet. App. 7a n.1.). PDR does not dispute that the 2006 Order is a final order—in part, it promulgated binding regulations that indisputably carry the "force of law." *Columbia Broad. Sys., Inc. v. United States* ("*CBS*"), 316 U.S. 407, 418 (1942); Br. 48-49. But the question here is whether the Hobbs Act required the district court to follow the specific portion of the 2006 Order interpreting "unsolicited advertisement" in the TCPA. PDR argued below that the Hobbs Act did not impose this requirement. *See* Brief of Appellees at 20, *Carlton & Harris Chiropractic, Inc. v. PDR Network LLC*, 883 F.3d 459 (4th Cir. 2018) (No. 16-2185). Its argument here is "in support of that claim," *Yee*, 503 U.S. at 534, and fairly encompassed by the question presented. Therefore, this argument is properly before the Court.

Second, without disputing that the relevant portion of the 2006 Order *is* an interpretive rule, the Government argues that the Hobbs Act makes no distinction between legislative and interpretive rules. Govt. 34.

That is wrong. Only FCC "final orders" reviewable under 47 U.S.C. § 402 are reviewable under the Hobbs Act, 28 U.S.C. § 2342(1), and FCC "final orders" are limited to orders carrying the "force of law," *CBS*, 316 U.S. at 418. Even the Government's principal case recognizes that general principles of finality, which include whether an action is "'one by which rights or obligations have been determined, or from which legal consequences will flow,'" govern the "understanding of 'final order' for the purposes of the Hobbs Act." *US W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1054-55 (9th Cir. 2000) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). Interpretive rules do not qualify. They "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (internal quotation marks omitted).

Indeed, the Government recently acknowledged this basic principle in its brief in *Kisor v. Wilkie*, No. 18-15. There, the Government urged the Court to rework *Auer* deference so as to end the "seeming incongruity of giving controlling weight to an interpretive rule that is not meant to carry the force of law." Brief for the Respondent at 26. But here, the Government seeks an interpretation of the Hobbs Act that would create much the same "incongruity"—but through the more extreme mechanism of making agency interpretive rules *unreviewable* outside of a narrow period in which (as shown, *supra* at 11-16) judicial review will be unavailable to most parties against whom the rule could someday be enforced.

Whatever else may be said about the Hobbs Act, there is no reasonable argument that it was intended to give binding effect to interpretive rules that the APA classifies as non-binding. And that suggests a narrow alternative answer to whether the Hobbs Act

"*required* the district court in this case to accept the FCC's legal interpretation." Br. (i) (emphasis added). Because the FCC's interpretation of "unsolicited advertisement" is a mere interpretive rule, it binds no one. Br. 45-46.

CONCLUSION

For the foregoing reasons, the Fourth Circuit's judgment should be reversed.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394.

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Decker v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597 (2013) 28
Environmental Def. v. *Duke Energy Corp.*, 549 U.S. 561 (2007) 28
FCC v. *ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984) 8, 16
Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) 29, 32
Functional Music, Inc. v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959) 30
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Lambert Run Coal Co. v. *Baltimore & Ohio R.R.*, 258 U.S. 377 (1922) 18
Leyse v. *Clear Channel Broad., Inc.*, 545 Fed. Appx. 444 (6th Cir. 2013), cert. denied, 135 S. Ct. 57 (2014) 13, 19

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Nack v. *Walburg*, 715 F.3d 680 (8th Cir. 2013), cert. denied, 572 U.S. 1028 (2014) 13
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Railway Mail Ass'n v. *Corsi*, 326 U.S. 88 (1945) 20
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Communications Act of 1934 ch. 652, 48 Stat. 1064 (47 U.S.C. 151 *et seq.*):
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47 U.S.C. 227(b)(1)(C) 3, 5a
47 U.S.C. 227(b)(2) (2012 & Supp. V 2017) 3, 6a
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50 U.S.C. 167h(b) 2
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Samuel A. Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316 (1975) 25

3 *Bouvier's Law Dictionary and Concise Encyclopedia* (3d ed. 1914) 12

FCC:

Public Notice: Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding (Sept. 8, 2003), https://docs.fcc.gov/public/attachments/DOC-238758A1.pdf 5

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, In re:

17 FCC Rcd 17,459 (2002) 4

18 FCC Rcd 14,014 (2003) 4

21 FCC Rcd 3787 (2006) 5

68 Fed. Reg. 53,740 (Sept. 12, 2003) 5

71 Fed. Reg. 25,967 (May 3, 2006) 5

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 14

The Oxford English Dictionary (2d ed. 1989):

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Vol. 9 12

U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 25, 26

Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tulane L. Rev. 733 (1983) 25

Webster's New International Dictionary of the English Language (2d ed. 1958) 8, 11, 12

16 Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2012 & Supp. 2018) 27

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INTEREST OF THE UNITED STATES

The Administrative Orders Review Act (Hobbs Act), ch. 1189, 64 Stat. 1129, vests courts of appeals with "exclusive jurisdiction * * * to determine the validity" of certain federal agency actions. 28 U.S.C. 2342. This case presents the question whether a litigant in a private district-court lawsuit may collaterally attack the validity of a Federal Communications Commission (FCC or Commission) order that could have been challenged under the Hobbs Act when it was issued. Such collateral attacks would undermine the interests of the United States and regulated parties in conclusively determining the validity of covered agency actions. The United States therefore has a substantial interest in the question presented.

STATUTORY PROVISIONS INVOLVED

The relevant statutes are reprinted in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

1. The Hobbs Act gives the courts of appeals, other than the Federal Circuit, "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency actions, including "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1); see 47 U.S.C. 402(a).[1] The Act also applies to certain actions of the Secretary of Agriculture, Secretary of Housing and Urban Development, Secretary of Interior, Secretary of Transportation, Board of Immigration Appeals, Federal Maritime Commission, Nuclear Regulatory Commission, and Surface Transportation Board. See 8 U.S.C. 1252(a)(1); 28 U.S.C. 2342(2)-(7); 50 U.S.C. 167h(b); see also 42 U.S.C. 5841(f).

"Any party aggrieved by" a final agency action covered by the statute "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. "The action shall be against the United States," *ibid.*, and "the agency * * * may appear as [a] part[y] thereto * * * as of right," 28 U.S.C. 2348. When more than one petition for review is filed seeking review of a final agency order, the petitions are consolidated in a single court of appeals. 28 U.S.C. 2112(a)(3).

These requirements "promote[] judicial efficiency, vest[] an appellate panel rather than a single district

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[1] Review of additional FCC decisions is governed by 47 U.S.C. 402(b), which vests exclusive jurisdiction in the D.C. Circuit.

judge with the power of agency review, and allow[] uniform, nationwide interpretation of the federal statute by the centralized expert agency created by Congress." *CE Design, Ltd.* v. *Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010) (citations and internal quotation marks omitted), cert. denied, 562 U.S. 1138 (2011). They also "ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970) (*Transatlantic*).

2. The Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits the use of a fax machine to send an "unsolicited advertisement." 47 U.S.C. 227(b)(1)(C). The statute defines "unsolicited advertisement" to include "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. 227(a)(5).

The government has authority to enforce the TCPA. See 47 U.S.C. 501-503. The TCPA also creates private rights of action to enforce certain provisions and regulations. See 47 U.S.C. 227(b)(3) and (c)(5). Federal and state courts have concurrent jurisdiction over private TCPA lawsuits. See *Mims* v. *Arrow Fin. Servs.*, 565 U.S. 368, 371-372 (2012).

Congress authorized the FCC to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. 227(b)(2) (2012 & Supp. V 2017). In 2002, the FCC sought comment on the appropriate regulatory treatment of calls offering "free" goods or services.

17 FCC Rcd 17,459, 17,478 ¶ 31. The Commission observed that, "while these calls do not purport to sell something," they "often * * * are intended to generate future business" and are "motivated in part by the desire to ultimately sell additional goods or services." *Ibid.* The FCC also sought comment on issues relating to unsolicited fax advertisements. *Id.* at 17,482-17,484 ¶¶ 37-40.

In July 2003, following extensive public comment, the FCC issued an order ruling that "[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services" constitute "unsolicited advertisements" under the TCPA. 18 FCC Rcd 14,014, 14,097-14,098 ¶ 140. The agency subsequently received numerous petitions for clarification or reconsideration. One petition, filed by a healthcare publishing company, asked the FCC to reconsider or clarify its interpretation to exclude faxes offering free information about pharmaceutical products to pharmacists or free medical seminars to physicians.[2] Another asked the FCC to clarify that faxes offering "specialized trade or business publications provided at *no charge*" are not "unsolicited advertisements."[3] The FCC issued

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[2] CG 02-278 Pet. of Jobson Publ'g L.L.C. at 1 (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509934940; see CG 02-278 Pet. of Coal. for Healthcare Comme'n (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509935015 (similar).

[3] CG 02-278 Pet. of Proximity Mktg. at 3 (Aug. 6, 2003), https://www.fcc.gov/ecfs/filing/5509535325; see CG 02-278 Pet. of Am. Bus. Media (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509934906 (similar).

a public notice seeking comment on the various petitions, including the two petitions described above.[4]

In 2006, the FCC issued a further order to implement then-recent statutory changes and "to address certain issues raised in petitions for reconsideration of" the 2003 order. 21 FCC Rcd 3787, 3788 ¶ 1. The 2006 order stated that "facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogues, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *Id.* at 3814 ¶ 52. The Commission explained that "'free' publications are often part of an overall marketing campaign" because, "while the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available." *Ibid.* The FCC concluded that "such messages describe the 'quality of any property, goods, or services'" under the TCPA's definition of "unsolicited advertisement." *Ibid.* (quoting 47 U.S.C. 227(a)(5)).

The FCC published a summary of this determination in the Federal Register. 71 Fed. Reg. 25,967, 25,973 (May 3, 2006). Two parties petitioned for judicial review of the order, but their challenge was dismissed on procedural grounds. *Biggerstaff* v. *FCC*, 511 F.3d 178 (D.C. Cir. 2007).

3. Petitioners publish the *Physicians' Desk Reference*, a compendium of prescription-drug information. Manufacturers pay to have their drugs included, Pet. App. 3a, and petitioners make the reference available to physicians and others free of charge, *id.* at 35a.

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[4] https://docs.fcc.gov/public/attachments/DOC-238758A1.pdf; see 68 Fed. Reg. 53,740 (Sept. 12, 2003).

According to the complaint, PDR Network sent respondent an unsolicited fax describing the benefits of the *Physicians' Desk Reference* and inviting respondent to request a free electronic version. Pet. App. 3a-4a. Respondent filed suit, alleging that petitioners had violated the TCPA by sending an unsolicited fax advertisement. *Id.* at 2a. Respondent sought to represent a class consisting of itself and other entities that had received the same fax. *Id.* at 4a.

Petitioners moved to dismiss the complaint for failure to state a claim. They "argued that the fax offering the free e-book could not be considered an unsolicited advertisement as a matter of law because it did not offer anything for sale." Pet. App. 4a-5a. Respondent opposed, citing the 2006 FCC order. *Id.* at 5a. Respondent further urged that, because the Hobbs Act vests courts of appeals with exclusive jurisdiction to determine the validity of final FCC orders, the district court could not reject or ignore the FCC's interpretation.

The district court granted petitioners' motion to dismiss. Pet. App. 32a-43a. The court analyzed the 2006 FCC order under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 39a-40a. At step one of the *Chevron* analysis, the court held that the term "unsolicited advertisement" in the TCPA is unambiguously limited to faxes with a commercial aim. *Id.* at 40a-41a; see *id.* at 36a-37a. It concluded that the FCC's interpretation in the 2006 order therefore was not entitled to deference. *Id.* at 40a. The court also viewed the text of the 2006 order as consistent with the court's interpretation of the TCPA.

Id. at 40a-41a. Finally, the court concluded that respondent had not pleaded facts that would demonstrate that the fax here had a commercial aim. *Id.* at 42a-43a.

4. The court of appeals reversed. Pet. App. 1a-31a. The court observed that "[n]either party ha[d] disputed that the 2006 FCC rule is the sort of 'final order' contemplated by the Hobbs Act." *Id.* at 7a n.1. It then concluded that "[t]he district court erred when it eschewed the Hobbs Act's command in favor of *Chevron* analysis to decide whether to adopt the 2006 FCC Rule." *Id.* at 8a. The court rejected petitioners' argument that the Hobbs Act did not apply because "the district court did not specifically invalidate" the FCC's rule, but "merely chose not to apply it." *Id.* at 10a. It concluded that "[i]nvalidation by any other name still runs afoul of the Hobbs Act's constraints." *Ibid.* The court of appeals also concluded that the 2006 order's "meaning is plain," *id.* at 13a, and that the order articulates "this simple rule: faxes that offer free goods and services are advertisements under the TCPA," *id.* at 14a.

Judge Thacker dissented. Pet. App. 19a-31a. Applying *Chevron*, she concluded that the TCPA is ambiguous as to whether an "advertisement" must have a commercial aim, and that the 2006 FCC order did require such a purpose. *Id.* at 25a-26a.

5. This Court granted certiorari, limited to the question whether the Hobbs Act required the district court in this case to accept the FCC's interpretation of the TCPA.

SUMMARY OF ARGUMENT

The Hobbs Act's grant of exclusive jurisdiction to the courts of appeals to determine the validity of particular agency orders deprives district courts and state courts

of authority to determine those orders to be invalid outside of the Hobbs Act's channels.

I. A. 1. The Hobbs Act's language is clear. A court "determines" the validity of an order when it "settle[s] a question or controversy about" the order's validity. *Webster's New International Dictionary of the English Language* 711 (2d ed. 1958) (*Webster's Second*). An order is "valid," in turn, if it is "sound [or] good," or "legally sufficient or efficacious; incapable of being rightfully overthrown or set aside." *Id.* at 2813. Consistent with that language, every court of appeals to consider the issue has determined that the Hobbs Act provides the exclusive procedure through which courts may decide whether a covered order is legally sound, and forecloses courts from making such determinations in civil litigation between private parties.

2. History confirms the statute's meaning. Congress borrowed the formulation here from the Emergency Price Control Act of 1942 (EPCA), ch. 26, 56 Stat. 23, which created "exclusive jurisdiction" in a particular court to "determine the validity of" certain price control orders. EPCA § 204(d), 56 Stat. 33. This Court interpreted that language to foreclose challenges to covered orders in enforcement proceedings, outside the prescribed statutory channels. *Woods* v. *Hills*, 334 U.S. 210, 213-214 (1948); *Yakus* v. *United States*, 321 U.S. 414, 429-430 (1944).

3. This Court's cases, too, establish that the Hobbs Act bars collateral attacks like those here. In *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970), the Court found a defense in a civil suit barred because it would amount to a collateral attack on a determination of the Federal Maritime Commission (FMC). In *FCC* v. *ITT World*

Communications, Inc., 466 U.S. 463, 468 (1984), the Court similarly barred an attempt to enjoin certain FCC consultations because the FCC had denied a rulemaking petition raising the same basic arguments. In applying a predecessor statute containing much of the Hobbs Act's operative language, this Court likewise focused on whether the effect of a litigant's claim would be to deem covered agency action invalid. *Venner* v. *Michigan Cent. R.R.*, 271 U.S. 127, 128-130 (1926).

4. Statutory text is reinforced by structure. The Hobbs Act requires that suits to determine the validity of covered orders be brought against the United States, to "ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Transatlantic*, 400 U.S. at 70. That design would be "vitiate[d]" if courts could determine covered orders to be invalid in civil suits between private parties, without the United States' participation. *Ibid.* Federal law also imposes stringent deadlines for Hobbs Act challenges, and provides for consolidation of such challenges in a single court of appeals, in order to provide swift, nationwide determinations of orders' validity. That structure would be undermined if litigants could obtain determinations that covered orders were invalid outside of the statutory time limits and centralized channels.

B. 1. Petitioners urge that the Hobbs Act's conferral of exclusive jurisdiction to "determine the validity" of covered enactments refers only to declaratory-judgment suits. But petitioners identify no definition, case, or treatise that supports that limitation. Surrounding provisions do not do so, either.

2. Petitioners also invoke the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* But the APA makes clear that agency actions are not subject to judicial review in enforcement proceedings when a statute creates a "prior, adequate, and exclusive" opportunity for review. 5 U.S.C. 703. The Hobbs Act satisfies the concept of adequacy developed in decisions of this Court and incorporated into the APA. Petitioners' inadequacy arguments are untethered to that concept, and lack merit on their own terms.

3. Petitioners invoke other statutes that permit challenges to regulations during enforcement actions. But those statutes lack the Hobbs Act's broad language, and do not share the relevant statutory history. Petitioners also invoke court of appeals decisions holding that litigants in Hobbs Act suits may call into question past orders that formed the basis for the agency action under review. But those decisions simply address the scope of timely Hobbs Act suits. The same circuit courts uniformly hold that litigants may not circumvent the Hobbs Act by challenging covered orders in civil suits between private parties. And the presumption of reviewability, on which petitioners also rely, has no application because the Hobbs Act provides a mechanism for judicial review of the covered agency actions.

4. Petitioners raised no constitutional arguments below, and constitutional avoidance has no role when the statutory text is clear. Moreover, neither due process nor separation of powers bars Congress from establishing an exclusive channel for judicial review of certain agency orders.

II. Petitioners' belated contention that the FCC order in this case would not have been reviewable under the Hobbs Act is forfeited. The court of appeals found

it undisputed that the order was covered by the Hobbs Act. Petitioners did not challenge that determination in seeking certiorari or raise any argument pertaining to interpretive rules. In any event, the Hobbs Act covers "all final orders" of the FCC, aside from certain licensing decisions. 28 U.S.C. 2342(1); 47 U.S.C. 402(a). It draws no distinction between legislative and interpretive rules.

ARGUMENT

I. THE HOBBS ACT BARRED PETITIONERS FROM COLLATERALLY ATTACKING THE VALIDITY OF THE 2006 FCC ORDER IN CIVIL LITIGATION OUTSIDE THE HOBBS ACT'S CHANNELS

The Hobbs Act confers on the courts of appeals "exclusive jurisdiction" to "determine the validity of" specified categories of agency actions, including certain final orders of the FCC. 28 U.S.C. 2342; 47 U.S.C. 402(a). That exclusivity promotes finality, judicial economy, and the uniform interpretation of agency rules and orders, and it ensures that the United States is a party to the proceeding. As every court of appeals to address the question has determined, the Hobbs Act's jurisdiction-channeling provision precludes collateral attacks on covered agency orders in private state- or district-court litigation.

A. The Hobbs Act Provides The Exclusive Channel For Obtaining Judicial Review Of Covered Agency Orders

1. By vesting the courts of appeals with exclusive jurisdiction to "determine the validity of" specified agency actions, 28 U.S.C. 2342, the Hobbs Act establishes the exclusive procedure and venue to "settle a question or controversy about" such actions' validity. *Webster's*

Second 711; accord *ibid.* (defining "determine" as "decide by authoritative or judicial sentence"); 4 *The Oxford English Dictionary* 550 (2d ed. 1989) ("To settle or decide (a dispute, question, matter in debate) as a judge or arbiter."). A court determines an order's "validity" when it decides whether the order is "sound [or] good," or "legally sufficient or efficacious; incapable of being rightfully overthrown or set aside." *Webster's Second* 2813 (defining "valid"); accord 9 *The Oxford English Dictionary* 410; 3 *Bouvier's Law Dictionary and Concise Encyclopedia* 3387 (3d ed. 1914).

Petitioners contend (Br. 19) that the Hobbs Act's exclusivity provision "speaks *only* to jurisdiction over a specific type of proceeding: one for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government." The text of the statute does not support that reading. To be sure, a court may "determine the validity of" an agency action in a suit brought against the government in which the plaintiff seeks declaratory or injunctive relief. But a court that holds an agency order to be invalid in the course of adjudicating one private party's liability to another is likewise "determin[ing]" the order's "validity."

Every court of appeals to address the issue has accordingly construed the Hobbs Act to bar courts from determining the validity of covered agency actions in *any* proceeding outside the Hobbs Act's channels, whether or not the litigant who disputes the action's validity seeks declaratory or injunctive relief against the government. They have applied the Hobbs Act to preclude challenges to agency regulations in suits between private parties, *e.g.*, *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119-1121 (11th Cir.

2014); *Leyse* v. *Clear Channel Broad., Inc.*, 545 Fed. Appx. 444, 459 (6th Cir. 2013), cert. denied, 135 S. Ct. 57 (2014); *Nack* v. *Walburg*, 715 F.3d 680, 685-687 (8th Cir. 2013), cert. denied, 572 U.S. 1028 (2014); *CE Design, Ltd.* v. *Prism Bus. Media, Inc.*, 606 F.3d 443, 447-448 (7th Cir. 2010), cert. denied, 562 U.S. 1138 (2011); *Daniels* v. *Union Pac. R.R.*, 530 F.3d 936, 940-941 (D.C. Cir. 2008); *City of Peoria* v. *General Elec. Cablevision Corp.*, 690 F.2d 116, 119-121 (7th Cir. 1982), and to preclude the assertion of such challenges as defenses to civil enforcement actions brought by the government, *e.g.*, *United States* v. *Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000); *United States* v. *Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001).

2. The Hobbs Act's history confirms the clear import of the statutory text.

The Hobbs Act language vesting the courts of appeals with "exclusive jurisdiction" to "determine the validity of" covered orders derives from the EPCA. Under the EPCA, a party wishing to challenge orders fixing maximum prices and rents was required to file a protest with a federal administrator—and, when the statute was enacted, to do so within sixty days. § 203(a), 56 Stat. 31. An aggrieved party could then appeal to a special court comprised of Article III judges, which had "exclusive jurisdiction to determine the validity of" a covered order, subject to review by this Court. § 204(d), 56 Stat. 33; see § 204, 56 Stat. 31-33.

This Court construed the EPCA's jurisdiction-channeling provision to bar other courts from determining the validity of covered orders in all types of litigation, including enforcement suits. In *Yakus* v. *United*

States, 321 U.S. 414 (1944), the Court held that the statute deprived district courts of "power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation." *Id.* at 429; see *id.* at 430. The Court similarly found "no doubt" that the EPCA barred a district court "from determining the validity of an individual rent order" in a civil enforcement suit against a landlord to recover allegedly excessive rents, "even though the defense to the action brought there was based on the alleged invalidity of the order." *Woods* v. *Hills*, 334 U.S. 210, 213-214 (1948).

When language is "obviously transplanted from another source, whether the common law or other legislation, it brings the old soil with it." *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019) (citation omitted) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). By incorporating EPCA language that this Court had authoritatively construed, Congress signaled its intent that the Hobbs Act's grant of "exclusive jurisdiction" to "determine the validity" of specified agency actions should be understood in a like manner.

3. a. This Court has interpreted the Hobbs Act as barring litigants from challenging the validity of covered agency orders during suits between private parties.

In *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), vessel owners refused to pay certain cargo fees, asserting that the fees were invalid without pre-approval from the FMC. *Id.* at 70. The port operator brought suit for damages and declaratory relief against a vessel-owner organization. *Ibid.* The district court stayed the proceedings to allow the parties to obtain a ruling from the

FMC, which concluded that the fees were largely valid because they had not required pre-approval. *Ibid.* An affected carrier then moved to intervene in the damages action, on the ground that it would be liable for part of any judgment. *Id.* at 67. The court granted intervention, but refused to consider the carrier's argument—raised as a defense to potential civil liability—that the FMC had erred in deeming the tariff revisions valid. *Ibid.*

This Court upheld the district court's refusal to consider the carrier's arguments because that court was "without authority to review the merits of the Commission's decision." *Transatlantic*, 400 U.S. at 69. It relied on the Hobbs Act's "explicit" statement that "'[t]he court of appeals has exclusive jurisdiction to . . . determine the validity of'" final orders of the FMC. *Ibid.* (citation omitted). The Court explained that an exception for cases involving referrals to the FMC "would vitiate the scheme of the [Hobbs Act]—a scheme designed to ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Id.* at 70.

This Court also rejected the carrier's argument that, because it had not been a party to the FMC proceedings, it was "not bound by the Commission's action." *Transatlantic*, 400 U.S. at 71. The Court explained that the carrier was in fact "represented before the Commission and ha[d] previously made numerous claims to party status." *Ibid.* The Court further held that, "[e]ven if [the carrier] was not a formal party" in the administrative proceeding, it was not entitled to raise a collateral attack "in a different and inappropriate forum" because "[the carrier's] interests were

clearly at stake" in the administrative proceeding, "it had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals," and "[i]t chose not to do so." *Id.* at 72. The Court's application of the Hobbs Act to preclude consideration of a legal question in a private damages suit confirms that the Act's preclusive effect extends beyond suits seeking declaratory or injunctive relief against the government.

b. *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463 (1984), similarly made clear that the Hobbs Act jurisdictional inquiry turns on whether a litigant's claims would require a court to engage in "review of final [covered] FCC orders." *Id.* at 468. The plaintiffs had filed a rulemaking petition asking the FCC to disclaim intent to engage in certain consultations. *Id.* at 465. After the agency denied that petition, the plaintiffs filed suit in district court. *Id.* at 465-468. They did not seek judicial relief with respect to the FCC order, but instead requested that the court enjoin the consultations themselves. *Id.* at 468. This Court held that the district court could not entertain the suit because the Hobbs Act establishes the exclusive avenue for "review of final FCC orders," and "[l]itigants may not evade" the Act's strictures "by requesting the District Court to enjoin action that is the outcome of the agency's order." *Ibid.* That decision confirms that the Hobbs Act inquiry turns not on the form of relief requested, but on whether a claim called upon the court to "determine the validity" of a covered order. 28 U.S.C. 2342.

c. In construing closely related statutes, courts have likewise focused on whether a suit is "in substance a collateral attack on [a covered] order" or whether the "practical effect of a successful suit would contradict

or countermand" a covered order. *B. F. Goodrich Co.* v. *Northwest Indus., Inc.*, 424 F.2d 1349, 1352-1354 (3d Cir.), cert. denied, 400 U.S. 822 (1970).

This Court prescribed that approach in construing the Act of Oct. 22, 1913 (Urgent Deficiencies Act), ch. 32, 38 Stat. 208, which governed review of many final FCC orders before the Hobbs Act's enactment. See Communications Act of 1934, ch. 652 § 402(a), 48 Stat. 1093. That statutory scheme provided the template for a substantial portion of the Hobbs Act's language, by conferring on specially constituted courts "exclusive jurisdiction" over suits to "enjoin, set aside, annu[]l, or suspend[]" certain orders. 28 U.S.C. 46 (1934); see Act of June 18, 1910, ch. 309, 36 Stat. 539-540 (establishing "exclusive" jurisdiction in a commerce court over "[c]ases brought to enjoin, set aside, annul, or suspend" certain orders); Urgent Deficiencies Act, 38 Stat. 219-220 (transferring jurisdiction of the commerce court to district courts operating under special procedures).

In applying that exclusive-jurisdiction provision, this Court focused on the practical effects of particular suits. It explained in *Venner* v. *Michigan Central Railroad*, 271 U.S. 127 (1926), that a suit was subject to the exclusive-jurisdiction provision, even if it "does not expressly pray that [a covered] order be annulled or set aside," if the suit "assail[s] the validity of the order and pray[s] that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside." *Id.* at 130. Accordingly, a shareholder in a railroad could not bring a suit against the railroad outside the channels of Urgent Deficiencies Act review, when the shareholder sought to enjoin the railroad from carrying out an agreement that the ICC had approved.

Id. at 129. In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U.S. 377 (1922), the Court similarly held that a mining company's suit against a railroad to enjoin it from distributing coal cars constituted a suit to set aside an ICC order because an ICC order had sanctioned the relevant coal-car schedule. *Id.* at 381-382.

4. The Hobbs Act's structure and objectives reinforce the understanding described above. Adherence to the Hobbs Act's jurisdictional scheme "ensure[s] that the Attorney General has an opportunity to represent the interest of the Government whenever an order of the specified agencies is reviewed." *Transatlantic*, 400 U.S. at 70; see 28 U.S.C. 2344. Here, as in *Transatlantic*, that aspect of the statutory design would be "vitiate[d]," 400 U.S. at 70, if petitioners could assert the invalidity of the 2006 FCC order as a defense to respondent's TCPA suit.

Permitting such collateral challenges would undermine other aspects of the statutory scheme as well. Many provisions governing Hobbs Act review are designed to facilitate quick, nationwide resolution of the validity of covered agency actions. These provisions establish a 60-day filing deadline, mandate direct court-of-appeals review, and provide for consolidation of multiple challenges in a single court of appeals. Taken together, they enable private entities, in structuring their operations, to act in reliance on agency orders once the time for review has expired. The Chamber of Commerce (Amicus Br. 6) describes this protection of reliance interests as "vital to the national economy," noting that "[o]nce rules are final, businesses build their operations, policies, and products around federal regulatory expectations, often over many years." See *id.* at 6-7 (examples).

In the TCPA context, the Hobbs Act ensures that businesses engaged in telemarketing can avoid liability in private TCPA suits by relying on safe harbors defined by the FCC. See, *e.g.*, *Leyse*, 545 Fed. Appx. at 445 (Hobbs Act barred collateral challenge to FCC's safe harbors in TCPA suit). In the present case, the interpretation reflected in the 2006 FCC order tends to support respondent's claim that petitioners violated the TCPA. Under petitioners' narrow conception of the Hobbs Act's exclusive-jurisdiction provision, however, a *plaintiff* in private TCPA litigation could likewise collaterally attack a prior FCC order that found the defendant's conduct to be lawful, urging the court to find the order invalid and to impose liability on the defendant. The Hobbs Act framework, and the reliance interests it serves, would be severely undermined if private parties could challenge the validity of covered orders in myriad courts, after the period for Hobbs Act challenge had passed.

B. Petitioners' Contrary Arguments Lack Merit

As noted above, petitioners contend (Br. 19) that the Hobbs Act judicial-review mechanism is exclusive only with respect to proceedings "for direct review of agency action, in which the petitioner seeks declaratory or injunctive relief against the government." Under that approach, litigants could assert the invalidity of covered agency actions in private civil suits long after the period for Hobbs Act review had expired. That interpretation should be rejected.

1. Petitioners' arguments lack a basis in the text

Petitioners identify no dictionary, treatise, or other source that defines "determine," "validity," or any other Hobbs Act term in a way that supports their truncated

conception of the Act's exclusive-jurisdiction provision. As explained above, when a court concludes that one party is not liable to another because an agency order reflects an impermissible interpretation of the governing statute or is otherwise unlawful, that court has "determin[ed] the validity of" the pertinent order under any natural understanding of that term.

Petitioners suggest (Br. 21) that several decisions of this Court support their narrow construction of the key statutory language. But those decisions simply describe declaratory-judgment actions as a way to determine the validity of a provision, without suggesting that such suits are the *only* mechanism for accomplishing that result. See *Calderon* v. *Ashmus*, 523 U.S. 740, 746 (1998) (describing prior decision as holding that a company "could bring a declaratory judgment action to determine the validity of insurance policies"); *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88, 91 (1945) (describing a suit "in a state court for a declaratory judgment to determine the validity" of a provision).

Petitioners also invoke (Br. 13-14) the interpretive canon *noscitur a sociis*. They argue that the terms "'enjoin,'" "'suspend,'" and "'set aside'" all refer "to a specific type of relief—injunctive," and that the term "'determine the validity'" therefore should be construed as referring to another "specific type of relief—declaratory." *Ibid.* (citation omitted). But *noscitur a sociis* has "no place, as this Court has many times held, except in the domain of ambiguity." *Russell Motor Car Co.* v. *United States*, 261 U.S. 514, 519 (1923); see *United States* v. *Stevens*, 559 U.S. 460, 474-475 (2010). The term "determine the validity" unambiguously encompasses the situation presented here, where a court

is asked to decide the lawfulness of a prior FCC order in resolving a dispute between private parties.

Moreover, as noted above, the Court in *Venner* held that the Urgent Deficiencies Act should be construed by reference to the practical effect of the suit in question, rather than to the relief for which the litigant "expressly pray[s]." 271 U.S. at 130. The Court thus recognized that a suit may be one to "set aside" an agency order even if it does not request injunctive relief against the government. *Ibid.* Given that holding, the *noscitur a sociis* canon cuts *against* petitioners' understanding of the term "determine the validity."

Petitioners' reliance on 28 U.S.C. 2349(a), entitled "Jurisdiction of the proceeding," is likewise misplaced. That provision states that, upon filing of a Hobbs Act suit, the court of appeals "has jurisdiction to vacate stay orders or interlocutory injunctions" and "to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency." *Ibid.* Petitioners contend (Br. 22) that, "[i]n tying the 'determine the validity' phrase to a 'judgment,' § 2349 makes clear that the phrase refers to a remedy that the courts of appeals may enter as part of the judgment."

Petitioners' argument conflates the judicial relief that the Hobbs Act *authorizes* with the broader range of collateral attacks that it *forecloses*. The Hobbs Act authorizes courts of appeals to conduct direct review of covered agency actions, in a proceeding where the United States is named as respondent. Section 2349 delineates the court's jurisdiction and powers in conducting that form of direct review. In authorizing a review-

ing court "to make and enter * * * a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency," Section 2349(a) specifies the types of relief that a court may enter *in a Hobbs Act proceeding against the government*. 28 U.S.C. 2349(a).

The Hobbs Act's barrier to collateral attacks is set forth not in Section 2349, which defines the jurisdiction and powers of courts that conduct Hobbs Act review, but in Section 2342, which states that the Hobbs Act provides the "exclusive" means of obtaining specified types of rulings. Section 2342 does not contain the word "judgment" that petitioners highlight in Section 2349(a). Thus, rather than stating that courts of appeals have exclusive jurisdiction to enter "a judgment determining the validity of" a covered agency order (28 U.S.C. 2349(a)), Section 2342 states more broadly that those courts have exclusive jurisdiction "to determine the validity of" covered orders (28 U.S.C. 2342). Petitioners disregard that textual difference.

Petitioners also rely on a Communications Act provision directing that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission" must "be brought as provided by and in the manner prescribed in" the Hobbs Act. Pet. Br. 23 (quoting 47 U.S.C. 402(a)). Petitioners contend (*ibid.*) that because this provision refers "only to proceedings 'brought' to obtain non-monetary relief against the FCC," the Hobbs Act should be read to embody the same limitation. But the Communications Act provision is not plausibly read to reach only "proceedings 'brought' to obtain non-monetary relief against the FCC," *ibid.*, because the Court in *Venner* construed virtually identical language governing review under the Urgent Deficiencies Act to

lack such a limitation. 271 U.S. at 130; see Urgent Deficiencies Act, 38 Stat. 220 (provision governing "any suit brought to suspend or set aside, in whole or in part, any order of" a covered agency); see also 28 U.S.C. 46 (1934); pp. 17-18, *supra*. In any event, because the Hobbs Act defines the "exclusive jurisdiction" vested in the courts of appeals in broader terms than those used in the Communications Act, see 28 U.S.C. 2342, it would be inappropriate to import any textual limitations in Section 402(a) into the Hobbs Act's exclusive-jurisdiction provision.

Petitioners also suggest (Br. 34) that, if Congress had intended to foreclose collateral attacks on the validity of agency orders in private civil lawsuits, it would have stated that intent explicitly. As petitioners points out, some more recent jurisdiction-channeling provisions state that covered agency actions "shall not be subject to judicial review in any civil or criminal proceedings for enforcement." See *ibid.* (quoting 33 U.S.C. 1369(b)(2)) (emphasis omitted). But Congress enacted the Hobbs Act more than a decade before any of the provisions on which petitioners rely. Well before the Hobbs Act was enacted, moreover, the Court in *Venner* had held that the Urgent Deficiencies Act's conferral of exclusive jurisdiction foreclosed collateral challenges in litigation between private parties. 271 U.S. at 130. The fact that more recent Congresses have foreclosed collateral challenges through differently worded provisions—none of which include the term "exclusive jurisdiction"—does not cast doubt on the proper interpretation of the Hobbs Act.

2. *The Administrative Procedure Act does not support petitioners' reading of the Hobbs Act*

In arguing that the Hobbs Act's exclusive-jurisdiction provision is limited to suits for declaratory and injunctive relief against the government, petitioners rely in part (Br. 24-31) on 5 U.S.C. 703, a provision of the earlier-enacted APA. Section 703 provides in pertinent part that, *"[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law*, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703 (emphasis added). Section 703 thus establishes a general rule that, when a defendant's liability depends in part on the propriety of an agency action, that action ordinarily can be challenged in a civil or criminal enforcement suit. The italicized language specifically contemplates, however, that judicial review of a prior agency action will be *un*available during enforcement proceedings if an "adequate" opportunity to obtain review was previously available and that avenue has been designated as "exclusive."

Petitioners suggest (Br. 24-31) that Section 703's prerequisites to preclusion of review are not satisfied here because the Hobbs Act does not afford petitioners an "adequate" opportunity to challenge the 2006 FCC order. That argument lacks merit.

a. Section 703's reference to an "adequate" opportunity for judicial review was drawn from this Court's pre-APA decisions addressing exclusive-jurisdiction provisions. In *Yakus*—decided two years before the APA was enacted—the Court held that foreclosure of judicial review in later enforcement proceedings posed no due process problem so long as litigants had previously received an "adequate" opportunity to challenge

the relevant agency order. 321 U.S. at 434, 436-437. The Court declined to deem "inadequate" the prior opportunity in *Yakus*, which involved filing a claim before the agency and then seeking review from a special Article III court. *Id.* at 436; see *id.* at 434-437; see also *Bowles* v. *Willingham*, 321 U.S. 503, 516 (1944) ("Here, as in the *Yakus* case, the standards prescribed by the act are adequate for the judicial review which has been accorded."). The Court thus made clear that exclusive-review mechanisms are not "inadequate" simply because litigants must present their claims to the agency and then seek judicial review within a particular time. See *Yakus*, 321 U.S. at 433-435 & n.3.

Section 703 is most naturally understood to incorporate the concept of "adequacy" that the Court articulated in *Yakus*. Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 Tulane L. Rev. 733, 741 n.34 (1983) (explaining that Section 703 "incorporates the 'adequacy' standard of *Yakus*"); see Samuel A. Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316, 353 n.205 (1975) (describing Section 703 as a "codification of [the] *Yakus* rule"). That inference is confirmed by the *Attorney General's Manual on the Administrative Procedure Act* (1947) (*APA Manual*), which this Court has repeatedly cited as a persuasive authority. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) (citing cases). The manual explains that the APA incorporates "the legal standard which courts * * * ha[d] already developed" regarding "the adequacy of statutory review procedures," *APA Manual* 98, and that Section 703's statement regarding a "'prior, adequate,

and exclusive'" channel of review simply "restates existing law," *id.* at 99 (citations omitted); see *id.* at 100.

b. Petitioners' arguments for viewing Hobbs Act review as inadequate here are untethered to the concept that the APA incorporated. They are also implausible on their own terms.

Petitioners suggest (Br. 25-26) that Hobbs Act channels were not "adequate" within the meaning of Section 703 because petitioners could not have asserted a Hobbs Act challenge to the 2006 FCC order when respondent commenced the present suit in 2014. Petitioners are correct that they could not have invoked the Hobbs Act review mechanism at that time, both because they never presented their claims to the agency in connection with the 2006 order and because a Hobbs Act petition for review filed in 2014 would have been untimely.[5] Contrary to petitioners' suggestion, however, a mode of judicial review is not inadequate simply because a particular litigant fails to satisfy the statutory prerequisites for invoking it.

As one court explained in rejecting a similar argument, "'[i]t is hard to believe'" that Congress would have prescribed "a centralized forum [for] review," but "'made the remedy optional and contemplated that the regulation could also be challenged by defiance.'" *United States* v. *Szabo*, 760 F.3d 997, 1006 (9th Cir.

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[5] An entity becomes a "party aggrieved" entitled to seek Hobbs Act review of an agency determination by presenting its views to the agency—typically through a comment or other written submission on a proposed rule. *Water Transp. Ass'n* v. *ICC*, 819 F.2d 1189, 1192-1993 (D.C. Cir. 1987) (citation omitted). Parties also commonly become "part[ies] aggrieved" by seeking timely reconsideration of an order. 47 U.S.C. 405; see 47 C.F.R. 1.429(j). Reconsideration may be sought on grounds of "material error, omission, or [other] reason warranting reconsideration." 47 C.F.R. 1.429(*l*)(1).

2014) (citation omitted); see 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3943 (2012 & Supp. 2018). Petitioners' theory is also inconsistent with *Transatlantic*, in which the Court held that a litigant's collateral attack was precluded even though the passage of time had made Hobbs Act review unavailable. See 400 U.S. at 66-69. Petitioners are thus incorrect in suggesting that the Hobbs Act channel for review became inadequate simply because petitioners' failure to comply with its timing and agency-exhaustion requirements means that the channel is not now available to them.

Petitioners also suggest (Br. 26) that the Hobbs Act's review mechanism was inadequate because petitioners "had no basis to suspect" that the 2006 order would be construed as establishing that faxes offering free goods constitute "advertisements" under the TCPA. Petitioners' premise, however, is directly contrary to a holding below that this Court declined to review. The court of appeals found that the 2006 order was "clear and unambiguous," Pet. App. 13a, and articulated "this simple rule: faxes that offer free goods and services are advertisements under the TCPA," *id.* at 14a. Because this Court's grant of certiorari was limited to the question whether the Hobbs Act required the district court to accept the FCC's interpretation of the TCPA, 139 S. Ct. 478, petitioners' contention that the 2006 FCC order was actually ambiguous is not properly before the Court.[6]

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[6] Courts that lack jurisdiction to determine the validity of particular agency orders remain free to resolve ambiguities in those orders, and to consider the broader statutory scheme in deciding how an ambiguous agency pronouncement should be construed. Thus, a

Petitioners also posit (Br. 27-38, 33) other fact patterns under which the Hobbs Act review mechanism could be inadequate. Petitioners suggest that the statutory time limitations would make Hobbs Act review inadequate for "parties that first come into existence after the 60-day direct review window has closed," *id.* at 28, or in a case where Congress has superseded a rule by statute, *id.* at 33. That argument provides no sound basis for declining to enforce the Hobbs Act's exclusivity provision here.

Even in circumstances where a particular challenge could not feasibly have been brought within the initial 60-day window for seeking Hobbs Act review, potential challengers are not without recourse under the Hobbs Act. See *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) ("[A]n agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed."); see also *Natural Res. Def. Council* v. *Nuclear Regulatory Comm'n*, 666 F.2d 595, 603-604 (D.C. Cir. 1981). In any event, the possibility that the Hobbs Act review mechanism might be inadequate for other litigants with different claims does not mean that petitioners themselves lacked a "prior, adequate, and exclusive opportunity for judicial review" of the 2006 FCC order. 5 U.S.C. 703. Petitioners have identified no basis for doubting that they could feasibly

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court may choose, among "permissible reading[s]" of an agency regulation, the one that the court considers most in "harmony with the [court's] view of the statute." *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 573 (2007). But it may not "determin[e] that the regulation as written is invalid." *Ibid.*; see *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 608-609 (2013).

have utilized the Hobbs Act procedure to challenge the 2006 order. See *Yakus*, 321 U.S. at 447 (defendants could not collaterally attack regulation when they had not used "the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so").

In discussing *Transatlantic* and *ITT*, petitioners acknowledge that, when an order "settl[es] the rights or duties of a specific party" (Br. 29), or when a party participated in or was "adequately represented[] in" agency proceedings (Br. 31), the Hobbs Act's time-limited channels provide that party an adequate opportunity for review. Petitioners suggest (Br. 28), however, that no other regulated party can be expected to "stay[] abreast of rule-makings" or to challenge an assertedly unlawful agency rule before that rule is applied to its own activities. But the expectation that regulated parties will keep abreast of agency actions that may affect their operations is a basic premise of federal law. Federal law provides—and this Court's decisions reflect—that "the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947); see 44 U.S.C. 1507 ("Unless otherwise specifically provided by statute, filing of a document" in the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it"); see also *United States* v. *International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971). Petitioners are therefore mistaken in contending that the Hobbs Act provides an inadequate mechanism for challenges to agency rules of general applicability.

3. Petitioners' other statutory arguments also lack merit

Petitioners argue (Br. 31-33) that the Hobbs Act should be construed to allow collateral challenges to the validity of rules in civil litigation between private parties because certain other agency-review statutes channel declaratory-judgment challenges to appellate courts while also permitting challenges to regulations during enforcement actions. But the Hobbs Act—unlike the statutes that petitioners invoke—vests the courts of appeals with "exclusive jurisdiction" to "determine the validity of" the classes of agency actions specified in the statute. 28 U.S.C. 2342. The clear import of that statutory language is reinforced by the fact that two statutes from which critical Hobbs Act language was drawn had previously been construed to foreclose collateral attacks in civil suits and enforcement actions. See *Venner*, 271 U.S. at 128-130; *Yakus*, 321 U.S. at 429-430.

Petitioners also invoke (Br. 27) court of appeals decisions holding that, when an agency applies an order in a later proceeding that is itself subject to review under the Hobbs Act, the new Hobbs Act proceeding may include review of the earlier order. See, *e.g.*, *Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959). But the decisions on which petitioners rely reflect the conclusion that an agency action that applies a past determination starts a new sixty-day period for review under the Hobbs Act. Even then, review must be obtained in the court of appeals under the Hobbs Act procedures. The courts of appeals have uniformly rejected arguments that district courts may entertain collateral attacks on covered orders that are brought outside the Hobbs Act's channels. See pp. 12-13, *supra*.

Petitioners' reliance (Br. 35) on the presumption of reviewability is similarly misplaced. Absent clear evidence of a contrary congressional intent, courts presume that "Congress intends judicial review of administrative action." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption is implicated, however, only when one potential reading of a statute would insulate particular agency action from *all* judicial review. In this case, the Fourth Circuit did not dispute that the 2006 FCC order was subject to judicial review; it simply held that the Hobbs Act procedures were the sole means by which such review could be obtained. "Because court of appeals review is available, this case does not implicate 'the strong presumption that Congress did not mean to prohibit all judicial review.'" *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 n.8 (1994) (citations omitted).

4. Principles of constitutional avoidance do not support petitioners' approach

Petitioners press (Br. 39-45) constitutional arguments that were neither raised nor addressed below. They contend that, to avoid potential constitutional concerns, this Court should construe the Hobbs Act's exclusive-jurisdiction provision as limited to suits seeking declaratory or injunctive relief. The principle that constitutional difficulties should be avoided if possible, however, "does not give the court the authority to rewrite a statute as it pleases," but simply permits a court to "'choose between competing plausible interpretations of a statutory text.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 843 (2018) (brackets, citation, and emphasis omitted). Given its language, the history of its operative terms, and this Court's precedents, the Hobbs

Act cannot plausibly be read to contain the limitation that petitioners advocate.

In any event, petitioners' constitutional claims lack merit. Due process does not require that litigants be permitted to challenge an agency order at whatever time, or in whatever forum, they prefer. It instead "requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones* v. *Flowers*, 547 U.S. 220, 226 (2006) (citation and internal quotation marks omitted). Here, petitioners had adequate notice and a meaningful opportunity to obtain review of the 2006 order. See *Merrill*, 332 U.S. at 384-385; *International Minerals*, 402 U.S. at 563; 44 U.S.C. 1507.

The availability of judicial review also refutes petitioners' separation-of-powers argument (Br. 41-45). The Hobbs Act does not deny the federal judiciary the power to decide the legality of covered agency actions. Rather, the Act simply specifies review procedures to promote finality, uniformity, and judicial economy, and to ensure that orders are reviewed with the participation of the government and on a developed administrative record. "There is no constitutional requirement that [a challenge] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process." *Yakus*, 321 U.S. at 444; see *United States* v. *Ruzicka*, 329 U.S. 287, 292-294 (1946). Quoting Professor Hart, petitioners question whether, "in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court *where no adequate opportunity to have them determined by a court has been previously accorded*."

Pet. Br. 42 n.7 (emphasis added). Because petitioners had an adequate opportunity to obtain Hobbs Act review of the 2006 FCC order, that question is not implicated here.

II. PETITIONERS' ARGUMENT THAT THE 2006 FCC ORDER WAS NOT REVIEWABLE UNDER THE HOBBS ACT IS NOT PROPERLY BEFORE THIS COURT, AND LACKS MERIT IN ANY EVENT

In their merits brief, petitioners argue for the first time (Br. 45-50) that the 2006 FCC order was "not reviewable under 47 U.S.C. § 402(a) or the Hobbs Act" because the order constitutes an interpretive rule. Pet. Br. 49. The argument is not properly before the Court. It also lacks merit.

The court of appeals observed that "[n]either party has disputed that the 2006 FCC Rule is the sort of 'final order' contemplated by the Hobbs Act." Pet. App. 7a n.1. In seeking this Court's review, petitioners did not challenge that characterization of the arguments below, nor did they dispute that the 2006 order was covered by the Hobbs Act. Nor did petitioners raise any other argument based on the status of interpretive rules. Instead, they contended (Pet. 13-20) that the district court had not "determine[d] the validity of" the order within the meaning of Section 2342. An "argument" that was "not raise[d]" or "address[ed]" below is "forfeited." *United States* v. *Jones*, 565 U.S. 400, 413 (2012).

In any event, the statute's "exclusive" review framework extends to "all final orders * * * made reviewable by section 402(a) of title 47." 28 U.S.C. 2342(1). Section 402(a), in turn, makes reviewable "any order of the Commission," 47 U.S.C. 402(a), except for certain licensing decisions. The availability of Hobbs Act review therefore does not turn on whether the 2006 order sets

out a legislative rule or instead constitutes an interpretive rule. Surrounding subprovisions governing Hobbs Act review of other agencies' actions reinforce that conclusion. Several make reviewable "*all* rules [or] regulations" issued by particular agencies under specified statutory provisions, see 28 U.S.C. 2342(3) and (5) (emphasis added)—language that likewise draws no distinction between legislative and interpretive rules.

Section 2342 thus "contains no exception for 'interpretive' rules.'" *US West Commc'ns, Inc.* v. *Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000). Accordingly, courts applying the Hobbs Act have consistently treated as reviewable even those FCC orders that set out interpretive rules. See, *e.g.*, *Sorenson Commc'ns, Inc.* v. *FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009); *SBC Inc.* v. *FCC*, 414 F.3d 486, 501 (3d Cir. 2005); *Central Tex. Tel. Coop., Inc.* v. *FCC*, 402 F.3d 205, 213 (D.C. Cir. 2005). Petitioners therefore identify no sound basis for doubting that the 2006 FCC order could have been reviewed under the Hobbs Act when issued.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 2342 provides:

Jurisdiction of the court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

2. 28 U.S.C. 2344 provides:

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

3. 28 U.S.C. 2348 provides:

Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

4. 28 U.S.C. 2349(a) provides:

Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining

the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

5. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

6. 47 U.S.C. 227 (2012 & Supp. V 2017) provide in pertinent part:

Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

* * * * *

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or qual-

ity of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

* * * * *

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

* * * * *

(2) **Regulations; exemptions and other provisions**

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited

advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d) of this section;

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

* * * * *

7. 47 U.S.C. 402(a) provides:

Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

No. 17-1705

In the
Supreme Court of the United States

PDR Network, LLC, *et al.*,
Petitioners,

v.

Carlton & Harris Chiropractic, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF

AMERICAN BANKERS ASSOCIATION, CONSUMER BANKERS ASSOCIATION AND INDEPENDENT COMMUNITY BANKERS OF AMERICA AS *AMICI CURIAE*

IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*

American Bankers Association (ABA), Consumer Bankers Association (CBA) and Independent Community Bankers of America (ICBA) (collectively, the Associations) submit this brief as *amici curiae* in support of Respondent Carlton & Harris Chiropractic, Inc. (Respondent).[1]

ABA is an association representing the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend nearly $10 trillion in loans.[2]

CBA is the trade association for today's leaders in retail banking — banking services geared towards consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, effectively holding two-thirds of the industry's total assets.

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the *amici curiae* or their members made a monetary contribution to the preparation or submission of the brief.

[2] The Associations have obtained the written consent of the parties to file this *amicus* brief.

ICBA is an association that promotes an environment in which community banks can flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties.

The Associations' members will be directly affected by the Court's disposition of the issue presented in this case: *i.e.*, whether the Hobbs Act requires district courts to accept the Federal Communications Commission's (FCC) interpretations of the Telephone Consumer Protection Act (TCPA). The Associations' members must comply with TCPA requirements when they alert customers concerning questionable transaction requests, send notices of possible security breaches or engage in other vital customer communications. The Associations also are frequent participants in FCC and judicial proceedings that determine how TCPA requirements will be interpreted and enforced. The ability of the nation's banks to communicate effectively with their millions of customers will be impaired if district courts are empowered, contrary to the Hobbs Act, to adopt a patchwork of conflicting interpretations of TCPA obligations without regard to the authoritative rules issued by the FCC.

SUMMARY OF ARGUMENT

Efficient, effective communications are essential if banks are to serve their customers and comply with their regulatory obligations. Financial institutions regularly seek to send time-critical, non-telemarketing communications to millions of customers promptly, including suspicious activity alerts, data security breach notifications, alerts to promote fee avoidance, and delinquency notifications. These consumer-protecting messages can be sent most efficiently and in compliance with the TCPA's requirements if financial institutions can design and follow uniform, nationwide compliance programs and have reasonable certainty that the programs will not be upended by a decision from a single federal district court.

The Hobbs Act provides banks and other regulated entities with that certainty. The Act places regulation of interstate telephone communications squarely in the hands of the FCC and prescribes a streamlined process for challenging that agency's final orders. If collateral attacks on FCC orders are permitted outside of the Hobbs Act framework, financial institutions will face perpetual uncertainty concerning their compliance obligations under the TCPA. The result will deprive TCPA regulation of its intended, nationwide uniformity, undermine financial institutions' compliance measures taken in reliance on FCC orders, and discourage vital

communications between financial institutions and their customers.

ARGUMENT

I. THE HOBBS ACT ENSURES A STABLE COMPLIANCE ENVIRONMENT THAT ENCOURAGES VITAL COMMUNICATIONS WITH CUSTOMERS OF THE NATION'S BANKS

The Hobbs Act provides an efficient, streamlined process for challenging the final orders of the FCC and certain other agencies. The Act vests the power to overturn such orders exclusively in the federal courts of appeals and confines such challenges to direct review petitions initiated within 60 days of the effective date of the challenged order. Administrative Orders Review Act, 28 U.S.C. §§ 2341-2352 (2012).

Unlike the judge-made *Chevron* doctrine — which requires that courts give deference to an agency's interpretation of a statute it is entrusted to administer — the Hobbs Act does not require the judicial branch to defer to agency action. Instead, the Act reflects Congress's considered view that certain agencies' actions should be accorded deference once an expedited review by a court of appeals has been

completed. This Court should not abrogate Congress's intent by permitting collateral attacks on orders of agencies encompassed within the Hobbs Act's framework. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also United States Telecom Ass'n v. Fed. Commc'n Comm'n*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

By foreclosing perpetual, collateral attacks on orders that have been upheld by an appellate court or that have not been the subject of timely petitions for direct review, the Hobbs Act: (1) promotes judicial efficiency by avoiding multiple adjudications of the validity of the same agency action; (2) allows and gives effect to "uniform, nationwide interpretation of the federal statute by the centralized expert agency;" and (3) protects the legitimate interests of individuals and businesses that have made investment and compliance decisions in reliance upon agency orders. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (quoting CE Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443, 450 (7th Cir. 2010)); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 740 (1985); *cf. Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (affirming that regulated entities' "serious reliance interests" must be respected during the rulemaking process).

The uniformity and reliance interests protected by the Hobbs Act are especially critical to the efforts of banks to communicate with their customers in compliance with the FCC's orders interpreting the TCPA.

A. Effective Customer Communications by Banks Require National Regulatory Stability and Uniformity

Of all the institutions with which people must stay connected, their banks are among the most vital. As described in greater detail below, banks send automated informational messages to prevent fraud and identity theft, provide notice of security breaches, provide low-balance and over-limit alerts, and help consumers avoid delinquency, among other purposes. For institutions to reach their customers today, these messages must increasingly be placed to mobile telephone numbers. Over 50% of U.S. households are now "wireless-only," with that percentage rising to over 70% for adults between 25 and 34 years of age. Stephen J. Blumberg & Julian V. Luke, U.S. Dep't of Health & Human Services, Ctr. for Disease Control & Prevention, Nat'l Ctr. for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2017* 5 -6 (2018) (Tables 1 & 2).

Many of the informational communications that banks place to their customers are time-

sensitive. To be valuable to the recipient, these calls must be placed immediately — using automated means, not manual dialing — and must be placed in compliance with the TCPA. That statute prohibits, with limited exceptions, financial institutions and other businesses from placing calls to their customers' mobile devices using specific dialing equipment — an "automatic telephone dialing system" (or autodialer) — unless the institution has the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A) (2012). The TCPA empowers the FCC to adopt regulations implementing this "prior express consent" requirement, including by delineating the type of automated dialing equipment that comprises an autodialer (and thus will subject a message to the TCPA's restrictions) and by specifying the means by which prior express consent may be obtained. *Id.* § 227(b)(2).

The stability and uniformity of the FCC's TCPA regulations are critical to ensuring that banks can place consumer-benefitting informational calls in a cost-efficient manner. If district courts are free to reject FCC regulations and substitute their own judgment for that of the agency, the nationwide regulatory uniformity mandated by the Hobbs Act and the TCPA will be lost. The resulting, fractured compliance environment will complicate and frustrate the efforts of financial institutions to convey

important information to their customers as efficiently as possible and in compliance with the TCPA. These vital communications include the following types of messages.

a. Messages that Protect Consumers from Fraud and Identity Theft

Protecting customers from fraud and identity theft is a high priority of the financial services industry. Financial institutions have made significant investments in fraud monitoring to identify suspicious activities and transactions and to respond with timely messages to customers that might be at risk. Among the activities and risk factors financial institutions monitor for these purposes are: (1) customer purchases that are unusual in kind for the customer, such as purchases in amounts, or in geographic areas or at types of merchants, that depart from the customer's established buying patterns; (2) sizes and types of transaction authorization requests that present a high likelihood of fraud, such as high-dollar transactions, ATM withdrawals and purchases of goods that can readily be converted to cash; (3) transaction requests involving geographic areas, merchants or merchant types that recently have experienced unusual levels of fraud; and (4) suspicious non-monetary activities, such as changes of address closely accompanied by requests for new payment cards, and requests for new online

credentials, coupled with evidence of malware or phishing attacks.[3]

The volume of these required notifications, which average 300,000 to 400,000 messages per month for one large bank alone, cannot be accomplished at all, much less with acceptable speed, unless the process is automated. Manual calls placed in these circumstances would come too late to prevent harm to the customer, and probably would not even be attempted because of their sheer impracticality.

Financial institutions also are required, under the Fair Credit Reporting Act, to verify a customer's identity before authorizing the establishment of any new credit plan or extension of credit where a fraud alert has been placed on the customer's credit reporting agency file. Fair Credit Reporting Act § 605A, 15 U.S.C. § 1681c-1 (2012). Financial institutions rely on the efficiency of automated dialers and other automation technologies to contact these customers quickly, with the goal of verifying identity and immediately accommodating the customer's

[3] The Red Flags Rule, adopted by the Federal Trade Commission and other federal regulators of financial institutions, prohibits a card issuer from complying with a request for an additional or replacement card that follows less than 30 days after an address change, until it has notified the cardholder of the request. *See, e.g.*, 16 C.F.R. § 681.3 (2018).

request. For those customers who can most efficiently be contacted at mobile telephone numbers, the institution's inability to use automated calling methods is likely to delay the bank in contacting the customer or member, resulting in embarrassment — or worse — for those individuals.

b. Data Security Breach Notifications

Section 501(b) of the Gramm-Leach-Bliley Act, as well as the data security breach notification statutes of the 50 states and the District of Columbia, require financial institutions to establish response and customer notification programs to be implemented following any unauthorized access to customers' personal information. Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. No. 106-102, § 501(b), 113 Stat. 1338, 1436-37 (1999); *see, e.g.*, Cal. Civ. Code § 1798.29 (West); 815 Ill. Comp. Stat. Ann. 530/10(a) (West); N.Y. Gen. Bus. Law § 899-aa (McKinney); N.C. Gen. Stat. Ann. § 75-65 (West); Wash. Rev. Code Ann. § 19.255.010 (West). Those statutes permit the required notifications to be made by telephonic or electronic means. *See* Ark. Code Ann. § 4-110-105 (West); Conn. Gen. Stat. Ann. § 36a-701 (West); Del. Code Ann. tit. 6, § 12B-102(a) (West); Ga. Code Ann. § 10-1-912 (West); Haw. Rev. Stat. Ann. § 487N-2 (West); Idaho Code Ann. § 28-51-105 (West); 815 Ill. Comp. Stat. Ann. 530/10(a) (West);

La. Stat. Ann. § 51:3074; Minn. Stat. § 13.055; Mont. Code Ann. § 30-14-704; N.J. Stat. Ann. § 56:8-163 (West).

Over 1,244 data security breaches were publicly reported in the United States in 2018 alone, compromising the security of 446,515,334 personal records — an increase in the number of records breached of 126 percent over the number of records breached in 2017. Identity Theft Resource Center, 2018 End-of-Year Data Breach Report, https://www.idtheftcenter.org/2018-end-of-year-data-breach-report (last visited Feb. 7, 2019).

The banking, credit, and financial industry accounted for only 11% of all reported breaches during 2018. *Id.* Although most data breaches occur at entities far removed from the banking sector, financial institutions recognize that it is their customers who must be protected. Accordingly, upon learning of any data breach at a retailer, healthcare provider or other organization that potentially affects an institution's customers, the financial institution immediately seeks to contact customers to notify them of the breach and of any remedial action to be taken.

As a result, financial institutions deal in a high volume of data security breach notifications. A single financial institution might be responsible for 50,000

to 60,000 or more potential data security breach notifications per month.

Like fraud and identity theft alerts, breach notification alerts must be timely and reliable. As with fraud and identity theft alerts, the volume of data security breach notifications — both in terms of the numbers of reportable incidents and the numbers of affected customers that must be notified — necessitates the use of automated dialing if the required notices are to be sent in timely and effective fashion.

c. Remediation Messages

Closely related to data security breach notification messages are notices to customers concerning measures they may take to prevent identity theft resulting from a breach, such as placing fraud alerts on their credit reports and subscribing to credit monitoring services. In many notable security breach cases, affected institutions have offered to cover the costs of such services for consumers.

d. Calls to Distressed and Delinquent Borrowers

Banks seek to place calls to distressed or delinquent mortgage, credit card, or other borrowers. These calls are consumer-protecting communications designed to establish live contact with the borrower.

It is well-established that the earlier a creditor is able to communicate with a financially distressed borrower, the more likely the creditor will be able to offer the borrower a loan modification, interest rate reduction, forbearance on interest and fees during a temporary hardship or disaster, or other alternative that will help limit avoidable late fees, interest charges, negative credit reports, and, where appropriate, repossession of the collateral or foreclosure. *See* Bureau of Consumer Financial Protection, Comment Letter on FCC's Interpretation of the Telephone Consumer Protection Act 1 (June 13, 2018), https://ecfsapi.fcc.gov/file/10613092630663/BCFP%20comment%20to%20FCC%20on%20TCPA.pdf. ("Consumers benefit from communications with consumer financial products providers in many contexts, including . . . notifications about their accounts.") Mortgage servicing regulations, which require that servicers place calls with prescribed frequencies, reflect the well-established public policy goal of initiating conversations with financially distressed borrowers early in the delinquency in order to prevent foreclosure. Truth in Lending (Regulation Z), 12 C.F.R. pt. 1024 (2018).

B. Banks Have Instituted Costly and Extensive Compliance Procedures based upon the Hobbs Act Framework

As described above, the Hobbs Act channels judicial oversight of FCC orders into a defined process with a clear end point. In so doing, the Act permits affected parties to invest with reasonable confidence in measures designed to comply with those orders. As this Court has recognized, protection of such reliance interests is a legitimate goal of the regulatory process. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *Fed. Commc'n Comm'n v. Fox Television Stations*, 556 U.S. 502, 515 (2009).

In the 28 years since the TCPA was enacted, the FCC has issued a substantial body of regulations, orders and declaratory rulings that implement and interpret the TCPA's requirements. Relying upon the regulatory stability ensured by the Hobbs Act, financial institutions have made investment and compliance decisions based upon FCC orders that were not overturned pursuant to timely petitions for review.

A notable example of financial institutions' reliance on FCC orders that have withstood the Hobbs Act review process is the FCC's rule concerning how consumers may provide prior express consent to receive autodialed communications on their mobile

devices. Because the TCPA requires "prior express consent" but does not specify the means by which that consent may be given, banks and other businesses faced uncertainty in their early efforts to comply. In an order entered in 1992, the FCC held that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary," and that, accordingly, callers "will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992).

This "provided-number" rule, which the FCC has reaffirmed in subsequent orders, has guided banks in their documentation of many millions of consumer accounts over the decades since the rule was adopted.[4] In reliance on that rule, financial

[4] *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, 23 F.C.C. Rcd. 559, 563 (2008). In a later decision, the FCC found that autodialed marketing – as opposed to informational – calls placed to mobile devices may be placed only with the prior express *written* consent of the called party. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C. Rcd. 1830, 1840 (2012). However, the FCC has not changed its rule concerning the form by which prior express consent may be provided for autodialed informational calls placed to mobile numbers.

institutions have asked account applicants to furnish contact telephone numbers, and have used those contact numbers to send suspicious transaction alerts, data security breach notifications and other informational communications over the course of those account relationships. One large bank reports that its cost to build a centralized infrastructure to capture and store customers' prior express consents in compliance with the TCPA is approximately $6 million, and that its annual expenditures to maintain that infrastructure and process are approximately $7.2 million. Other financial institutions have made investments and incurred expenses of similar magnitude, varying with their size and the scope of their operations.

Financial institutions also have trained millions of customer support, call center and marketing personnel on the TCPA and the institution's compliance procedures. The bank referenced above reports that it spends between $1.1 million and $1.5 million annually to train its employees in TCPA compliance. Each of the Associations' members incur such TCPA training costs.

The Hobbs Act has protected these reliance interests against collateral attack. For example, in 2008 a district court rejected the FCC's provided-number rule, concluding that a customer's act of

furnishing a mobile contact number to a creditor did not support the creditor's subsequent collection calls to that number. In a later order, the court vacated its decision on the ground that the Hobbs Act did not permit it to "enjoin, set aside, suspend . . . or determine the validity of" the FCC's final order adopting the provided-number rule. *Leckler v. Cashcall, Inc.*, 554 F.Supp. 2d 1025 (N.D. Cal. 2008), *vacated*, No. C 07-04002 SI, 2008 WL 5000528, *1 (N.D. Cal. Nov. 21, 2008). More recent court decisions also have applied the Hobbs Act to reject collateral attacks on the provided-number rule. *See Mais v. Gulf Coast Collection Bureau, Inc.*, No. 11-61936-Civ, 2013 WL 11941572, at *1 (S.D. Fla. May 23, 2013), *rev'd*, 786 F.3d 1110 (11th Cir. 2014).

A second example of actions taken in reliance on the FCC's TCPA rules involves the definition of an autodialer, the use of which requires prior express consent if a call is placed to a mobile number. 47 U.S.C. § 227(a)(1) (2012). The FCC has adopted a number of orders interpreting the statute's autodialer definition, and banks have invested many millions of dollars in equipment purchases and employee training in reliance on those orders. *See, e.g., In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7961, 7971-78 (2015) (interpreting the statutory definition of an autodialer). Many financial institutions have disagreed with the FCC's interpretation of the

autodialer definition, which was rejected in a 2018 decision of the United States Court of Appeals for the District of Columbia Circuit (following Hobbs Act procedures) and is the subject of a pending FCC remand proceeding. *ACA Int'l v. Fed. Commc'n Comm'n*, 885 F.3d 687 (D.C. Cir. 2018). However, financial institutions continue to rely upon the stability of the Hobbs Act process to ensure that any changes to the FCC's interpretation of the statutory definition will have the finality needed to support investment and compliance decisions taken in the future.

II. REMOVAL OF HOBBS ACT CONSTRAINTS WILL ADVERSELY AFFECT MILLIONS OF BANK CUSTOMERS NATIONWIDE

The importance of the Hobbs Act to TCPA compliance can be measured against the backdrop of the constant, crushing volume of TCPA class-action complaints. TCPA litigation increased by 46% in the 17 months since the FCC issued its 2015 Declaratory Ruling and Order interpreting the autodialer definition, as compared with the preceding 17-month period. U.S. Chamber of Commerce Institute of Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 2 (Aug. 2017), https://www.instituteforlegalreform.com/research/tcp

a-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits. Between 2010 and 2016, there was a 1,273% increase in TCPA litigants. Josh Adams, ACA Int'l, *Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends* 2 (May 2017) (emphasis omitted). These complaints invariably seek statutory damages of $1,500 per alleged violation rather than compensation for actual harm. *See Bais Yaakov of Spring Valley v. Fed. Commc'n Comm'n*, 852 F.3d 1078 (D.C. Cir. 2017) (Kavanaugh, J.), *cert. denied*, 138 S. Ct. 1043 (2018).

At any given time, hundreds of such lawsuits are working their way through the district courts, and the merits of those claims often hinge upon the application of FCC orders to the alleged facts. For example, plaintiffs may claim not to have given prior express consent to receive autodialed calls or argue that the equipment used to place a disputed call met the definition of an autodialer under the TCPA. Some parties to these lawsuits continue to argue that the district court should substitute its own judgment for that of the FCC, and that the court should reject FCC regulations and orders that otherwise would provide a clear path to resolution of the questions presented. A decision for the petitioner in this case would open the flood gates to district court second-guessing of the expert agency charged by Congress with implementation and enforcement of the TCPA. The

inevitable result would be to harm the interests of millions of financial institution customers. Faced with the loss of stable FCC rules concerning their TCPA compliance obligations, and threatened with vexatious lawsuits based upon a patchwork of conflicting district court decisions, financial institutions might have no choice but to cease sending many of the millions of automated informational alerts that customers have come to expect.

Substitution of manual communication methods would impose extensive costs as well as degradation in customer service. For example, one large institution reports that it sent 760,788,302 automated customer text messages in 2018, and that sending those messages manually rather than by automated means would have raised the cost of those communications by an estimated $287,577,978.

A community bank reports that communications involving 120,000 to 180,000 customer accounts would be adversely affected if automated fraud prevention messages could not be sent in reliance upon current FCC rules. Between 50% and 80% of that bank's accounts have mobile telephone numbers recorded as the customers' preferred mode of contact. The bank currently is investing in a program of text messaging to report suspicious transaction requests, according to which the bank would send a code that the customer could

return to the bank as confirmation of the request. If the bank no longer could use the customer's act of providing a mobile contact number as the basis for those messages, the program could not go forward except after a long and costly process of obtaining new consents, or by sending the texts manually at enormous cost and loss of efficiency. The bank reports that this prospect likely would require this valuable customer-protection program to be abandoned.

As these examples show, loss of the regulatory stability afforded by the Hobbs Act inevitably would raise customers' costs of banking services, and degrade or prevent valuable communications, with no offsetting customer benefit.

CONCLUSION

The Hobbs Act is an indispensable source of regulatory stability for those affected by decisions of the agencies to which it applies, and particularly for those subject to the TCPA and the implementing

orders of the FCC. The Court should reject Petitioners' suggestion that district courts are free to ignore the Hobbs Act and may entertain perpetual, collateral attacks on final agency orders.

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No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

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TABLE OF AUTHORITIES—CONT'D

Page(s)

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF ARGUMENT

Does a federal district court "determine the validity" of an agency's regulation under 28 U.S.C. § 2342 by interpreting a statute contrary to the interpretation embraced in the regulation? In this case, the answer to that question is no, though for reasons somewhat different from those given by the petitioners.

The Administrative Orders Review Act — commonly referred to as the "Hobbs Act" after its principal sponsor, Representative Samuel Hobbs — splits the jurisdiction of federal courts to address certain legal questions in certain federal cases. *See* Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as

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[*] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

amended at 28 U.S.C. §§ 2341-2351). It vests "exclusive jurisdiction" in the courts of appeals to perform a set of specified actions, with review obtainable within a 60-day time period and with regard to certain orders and regulations. But the Act leaves district courts to take any other actions — specifically, any actions *not* specified in the Hobbs Act's text — in the ordinary course of the district court's functions. By splitting federal court jurisdiction in this manner, the Hobbs Act raises questions of constitutional structure and statutory meaning.

First, as to constitutional structure: This Court addressed the constitutionality of such a "jurisdiction-splitting" provision in *Yakus v. United States*, 321 U.S. 414 (1944), where it held that the "exclusive jurisdiction" provisions of the Emergency Price Control Act of 1942 complied with due process and Article III. That statute created the Emergency Court of Appeals, a temporary Article III court vested with the "exclusive jurisdiction" to "determine the validity of any regulation or order" promulgated by the Office of Price Administration under certain statutory authorities. The *Yakus* Court held that this provision precluded a criminal defendant from raising the invalidity of a regulation as a defense in his criminal trial. In the Court's view, it was constitutional for Congress to "deprive" criminal defendants "of opportunity to attack" a regulation "in a prosecution for its violation." 321 U.S. at 431.

Yakus is a controversial precedent that has been criticized by Justices of this Court and by scholars. Indeed, the Court has gone so far as to suggest that aspects of *Yakus* should be cabined to the wartime

context. But this Court can decide this case based on a faithful construction of the Hobbs Act. If this Court, however, were to construe the Hobbs Act's jurisdictional provisions too broadly, it would raise a similar set of questions under Article III and the Due Process Clause as the Court confronted in *Yakus* — and it would require this Court to revisit that case's holding in the peacetime context.

Second, as to statutory meaning: The precise boundary between matters reviewable only directly and those reviewable in collateral proceedings is specified by the Hobbs Act's statutory terms. The courts of appeals have "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or [ ] determine the validity" of certain specified orders, 28 U.S.C. § 2342, including certain orders promulgated by the Federal Communications Commission ("FCC"), § 2342(a). To the extent that a statute other than the Hobbs Act vests courts with jurisdiction, a district court is free — indeed, it is obligated — to adjudicate a case using generally applicable principles, *unless* the district court takes one of the four actions identified in the Hobbs Act's text.

When a district court merely disagrees with an interpretation expressed in an agency's regulation, it does not take any of the four actions specified by the Hobbs Act. Congress borrowed the terms used in the Hobbs Act — "enjoin," "set aside," "suspend," and "determine the validity" — from preexisting statutory schemes governing judicial review of agency action. The term "enjoin" is familiar from the law of equitable remedies. At the time of the Hobbs Act's adoption in 1950, the terms "set aside" and "suspend" were also

familiar from special statutory provisions governing judicial review of agency action, such as the Urgent Deficiencies Act of 1913.

That leaves the statutory term "determine the validity of." Here, again, the key precedent is *Yakus*. As *amicus* explains below, the most natural inference is that, when Congress enacted the Hobbs Act in 1950, it borrowed the statutory language "determine the validity of" from the Emergency Price Control Act of 1942, which the Court construed in *Yakus* in 1944. Like the Hobbs Act, the Emergency Price Control Act split the jurisdiction of the federal courts, using similar terms to draw the line between the jurisdiction of the Emergency Court of Appeals and that of federal district courts. The most natural way to read "determine the validity of" in the Hobbs Act, thus, is to interpret those terms to carry the same meaning given to them in *Yakus*, as well as the same limitations that would have been in place when Congress enacted the Hobbs Act in 1950. *Yakus* held that a district court "determined the validity of" a regulation when the crime charged was a violation of the regulation itself. The validity of the regulation was necessarily an element of the crime. Where the dispute is (as here) over statutory meaning, the logic of *Yakus* does not apply.

Put differently, a court "determines the validity of" a regulation if, and only if, a violation of the regulation is necessarily a part of the elements of the crime or civil cause of action at issue in the case. The text of the Hobbs Act, the canon of constitutional avoidance, and the interpretive rules in place at the time of the Hobbs Act's enactment all point in the direction of allowing district courts to interpret

statutes, notwithstanding a prior agency interpretation, where the regulation is merely interpretive.

For these reasons, as well as those given below, *amicus* respectfully submits that the Court should reverse the judgment of the court of appeals.

BACKGROUND

This case is about the meaning of a set of terms "with a legal lineage stretching back" to early Twentieth Century statutes authorizing judicial review of administrative action. *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). Accordingly, before turning to an analysis of the Hobbs Act's provisions, it is fruitful to describe the constitutional backdrop against which it was enacted, as well as the sequence of statutes that culminated in the adoption of the Act's terms.

A. Constitutional framework

The Constitution's provisions indicate that certain kinds of disputes will occur in regularized processes before courts established under Article III. Article III vests the "judicial power of the United States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. In addition, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. But precisely which disputes and under what circumstances these regularized processes must occur has been, and continues to be, a subject of dispute. For at the same time that it vests the "judicial power" in Article III

courts, the Constitution authorizes Congress to limit the jurisdiction of federal courts. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

As a corollary to Congress's authority to limit the jurisdiction of federal courts, this Court has held that, at least under some circumstances, Congress may choose to vest a court with review of certain cases while barring it from reviewing certain questions that arise in the case — giving "exclusive jurisdiction" to review those questions to other courts. The canonical precedent addressing this form of "jurisdiction-splitting" is *Yakus*. *See* Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 341 (7th ed. 2015) (citing *Yakus* to address "the scope of congressional power to confer jurisdiction on a court while limiting its authority to consider particular issues that are relevant to the controversy").

Decided in 1944 near the height of the Nation's involvement in World War II — indeed, the Normandy landings occurred just a few months after the Court's decision — *Yakus* concerned a wartime measure known as the Emergency Price Control Act of 1942 (hereinafter, "EPCA"), 56 Stat. 23, 50 U.S.C. App. Supp. II, § 901 *et seq.*, as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C. App. Supp. II, § 961 *et seq.* In an effort to forestall wartime inflation, the EPCA created an Office of Price Administration ("OPA") and authorized its head, the Price Administrator, to set maximum prices for commodities and rents throughout the U.S. economy. *See Yakus*, 321 U.S. at 419-20; EPCA §§ 1(a), 2, 201(a), 56 Stat. at 23-24, 29 (describing the EPCA as "in the

interest of the national defense and security and necessary to the effective prosecution of the present war").

The EPCA created "exclusive jurisdiction" to review the lawfulness of the OPA's orders in the Emergency Court of Appeals, a tribunal staffed by Article III judges temporarily established to handle appeals from the Price Administrator. EPCA § 204(c), 56 Stat. at 32. Specifically, after the promulgation of the relevant regulation, order, or price schedule, a party generally had sixty days to file a protest with the Administrator to test the validity of a maximum price regulation. § 203(a), 56 Stat. at 31 (providing that "any person subject to" a regulation or order may, within 60 days after its issuance, "file a protest specifically setting forth objections" with the Administrator); *see id.* (providing that a later protest may be filed on grounds arising after the expiration of the original 60 days). If unsuccessful, any "person who [was] aggrieved" by the Price Administrator's actions could seek review within 30 days from the Emergency Court of Appeals. §§ 204(a)-(c), 56 Stat. at 31-32. Section 204(d) of the Act then gave the Emergency Court of Appeals (and the Supreme Court, on review of the Emergency Court's judgments) "exclusive jurisdiction to determine the validity of any regulation or order" and barred other courts from "consider[ing] the validity of any such regulation, order, or price schedule." § 204(d), 56 Stat. at 33.

At the same time, the EPCA gave jurisdiction to district courts to adjudicate civil enforcement actions by the Price Administrator, private lawsuits brought under the Act, and (most controversially) criminal prosecutions for willful violations of the Act.

Specifically, the Act pronounced that "[i]t shall be unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order" promulgated by the Price Administrator. EPCA § 4(a), 56 Stat. at 28. The Act then authorized the Price Administrator to seek relief in district courts for such violations. § 205, 56 Stat. at 33; *id.* § 205(b) (providing that "[a]ny person who willfully violates any provision of section 4 of this Act" has committed a crime).

Yakus arose in the criminal context, after the federal Government charged Yakus and his colleagues with selling wholesale cuts of beef at prices above the maximum prices set by sections 1364.451 to 1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed. Reg. 10381 *et seq.* A jury convicted him and his codefendants, and the First Circuit affirmed. *See* 137 F.2d 850. At the time of his conviction (and of the Supreme Court's review of it), Yakus had not sought judicial review of the regulation under sections 203 and 204 of the Act. *See* 321 U.S. at 418. Indeed, the federal government indicted Yakus after the expiration of the period for filing protests, while at the same time arguing that the defendants could not challenge the validity of the order in the district court proceedings — but rather had to use the "exclusive jurisdiction" provisions in a challenge in the Emergency Court of Appeals.

In *Yakus*, this Court held that Congress could, consistent with Article III and due process, "deprive" criminal defendants "of opportunity to attack" a regulation "in a prosecution for its violation," 321 U.S. at 431, by providing "a sufficiently adequate [alternative] means of determining the validity of" the

regulation," *id.* at 418. In part, the Court's holding appeared to rest on the EPCA's and the regulation's wartime status. The Court observed, for example, that "it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a war-time emergency measure." *Id.* at 431.

In part, the Court's holding appeared to rest on the broader notion that, even in times of peace, Congress had the "constitutional power . . . to create inferior federal courts and prescribe their jurisdiction." *Id.* at 433. Under this authority, the Court suggested that Congress generally could "foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation." *Id.* at 443. According to the Court, Congress could "mak[e] criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." *Id.* at 444. As the Court put it, the Constitution does not "preclude[] the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations." *Id.*; *see also id.* at 446 (describing the procedure as one in "which violation of a price regulation is made penal"); *id.* at 447 (noting that the "indictment charged a violation of the regulation").

In holding that the Act complied with Article III and due process, the Court rejected a series of contentions made by Yakus and his codefendants. For example, they argued that the regulation was invalid

because it would compel them to sell beef below the price that would allow them to make a profit. *See id.* at 431. They also argued that the 60-day period afforded by the Act to challenge the order gave them inadequate time to file. *See id.* at 433-34. The Court responded that the period was not "unreasonably short in view of the urgency and exigencies of wartime price regulation." *Id.* at 435; *see id.* at 441-42. The EPCA procedure, the Court concluded, "afford[ed] to those affected a reasonable opportunity to be heard and present evidence." *Id.* The end result was that, absent a "contention that the present regulation is void on its face," Yakus and his codefendants were precluded from challenging its validity in a criminal proceeding against them. *Id.* at 447; *see also Bowles v. Willingham*, 321 U.S. 503 (1944) (holding, in a case decided the same day as *Yakus*, that a landlord could not ask a district court to "determine the validity" of a price regulation in a civil action brought by the Price Administrator).

The Court's decision in *Yakus* was controversial. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378-79 (1953). It prompted two separate dissents. Justice Roberts dissented on the ground that the statute unconstitutionally delegated legislative power to the Administrator. *See* 321 U.S. at 448. Justice Rutledge, joined by Justice Murphy, argued that Congress lacked the power to confer on federal courts jurisdiction over criminal suits "and at the same time deny them 'jurisdiction and power to consider the validity' of the regulations for which enforcement is sought." *Id.* at 467. "It is one thing," Rutledge reasoned, "for Congress to withhold jurisdiction" and

"entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements." *Id.* at 468. "The problem," as Rutledge put it, "is not solely one of individual right or due process of law," but "equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process." *Id.*

Moreover, in the immediate aftermath of *Yakus*, Congress enacted a law to lessen some of the harshness of the EPCA's statutory review mechanism. In the Stabilization Extension Act, 58 Stat. 632 (1944), Congress removed the time period for filing a protest with the Price Administrator and directed a stay of enforcement suits in pending action on a protest already filed or review of its denial. In the case of a "reasonable and substantial excuse for the defendant's failure" to file a protest, a stay similarly was directed to allow a defendant to "file in the Emergency Court of Appeals a complaint against the [Price] Administrator." *Id.* at 639.

Finally, this Court's later cases cabined some of *Yakus*' jurisprudential ramifications. In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court distinguished *Yakus* by arguing in part that the case was limited to the wartime context. *Id.* at 839 n.15. The Court thereby held that an enforcement court could not predicate a criminal violation on a previous administration determination without a meaningful opportunity for the criminal defendant to seek judicial review of the administrative ruling. *See id.* Likewise, in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), Justice Powell wrote separately to express his views that the EPCA "can be viewed as

a valid exercise of the war powers of Congress," thereby rendering *Yakus* "at least arguably distinguishable" in civil enforcement matters during peacetime. *Id.* at 289-91 (Powell, J., concurring); *see also id.* at 282-84 & n.2 (majority opinion); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980).

B. Agency review statutes

Against this constitutional backdrop, the Hobbs Act creates "exclusive jurisdiction" in the courts of appeals, while at the same time leaving in place district-court proceedings so long as they do not engage in any of the four actions specified in the Hobbs Act's text. In splitting the jurisdiction of the federal courts in this manner, the Hobbs Act borrows terms from preexisting statutes — most notably, the Urgent Deficiencies Act of 1913 and the EPCA. Accordingly, it is helpful to walk through the steps that led to its adoption.

1. Early statutory review mechanisms.

Preexisting statutory review mechanisms for the agencies that ultimately composed the 1950 version of the Hobbs Act — the FCC, Federal Maritime Commission, and Department of Agriculture — borrowed terminology from an earlier ICC review statute. In 1913, Congress abolished the short-lived Commerce Court and transferred review of ICC orders to three-judge district courts. In a statute known as the "Urgent Deficiencies Act," Congress established the "venue of any suit [ ] brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC]." Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 219

(1913); *id.* at 220 (establishing that three-judge district courts were authorized to issue "interlocutory injunction[s] suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, of any [ICC] order"). The terminology used in the Urgent Deficiencies Act was a variation on the language used in earlier statutes establishing judicial review of ICC orders. *See* Act of June 29, 1906 (commonly known as "the Hepburn Act"), ch. 3591, § 5, 34 Stat. 584, 592 (conferring jurisdiction on the circuit courts to "enjoin, set aside, annul, or suspend any order or requirement of the [ICC]"); Act of June 18, 1910 (commonly known as the "Mann-Elkins Act"), ch. 309, § 1, 36 Stat. 539, 539 (conferring on the newly created Commerce Court "the jurisdiction now possessed by the circuit courts . . . over all cases . . . brought to enjoin, set aside, annul, or suspend . . . any order of the [ICC]"); *see, e.g.*, *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299, 308-09 (1927) (tracing the genesis of the review provisions contained in the Urgent Deficiencies Act).

These terms — among them, "enjoin," "set aside," and "suspend" — came to embody review through a bill in equity, which formed the basis of much early judicial control of agency action. *Cf. Los Angeles & S.L.R. Co.*, 273 U.S. at 314-15 (noting that the Court need not determine "[w]hether the remedy conferred by the Urgent Deficiencies Act is in all cases the exclusive equitable remedy"); *see* Louis L. Jaffe, *Judicial Control of Administrative Action* 157 (1965) (characterizing the Urgent Deficiencies Act as "[o]ne of the earliest of review statutes").

Thus, when Congress enacted the Communications Act of 1934 (which, among other

things, created the Federal Commissions Commission), it expressly provided that the "provisions of the [Urgent Deficiencies Act], relating to the enforcing or setting aside of the orders of the [ICC], are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act," with specified exceptions. § 402(a), 48 Stat. 1064, 1093 (1934).

Other statutes that became relevant to the Hobbs Act also either incorporated the Urgent Deficiencies Act expressly or used similar terminology. For example, the Shipping Act of 1916 provided that the venue for "suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall . . . be the same as in similar suits in regard to orders of the [ICC]." § 31, 39 Stat. 728 (1916). The Packers and Stockyards Act of 1921 authorized an "appeal[] to the circuit court of appeals . . . by filing . . . a written petition praying that the Secretary's order be set aside or modified" and provided that the "court may affirm, modify, or set aside the order of the Secretary." §§ 204(a), (e), 42 Stat. 159, 162 (1921); *see also id.* § 204(h) ("The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders . . ."). And the Perishable Agricultural Commodities Act of 1930 provided that an order could be "suspended, modified, or set aside by a court of competent jurisdiction" and that "all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside in whole or in part, of the orders of the [ICC] are made applicable to orders of the Secretary under this Act." §§ 10-11, 46 Stat. 531, 535 (1930).

2. Emergency Price Control Act.

Congress introduced the term "determine the validity of" into U.S. law in a statutory review provision accompanying the EPCA. To *amicus*' knowledge, no statutory review provision for administrative agency action used this language before the EPCA's enactment in 1942 (and, indeed, Congress had used the term only once before in any public law). *See* Act to Establish a Court of Private Land Claims, ch. 539, § 8, 26 Stat. 854, 857 (1891) (authorizing court to "determine the validity" of title). Of relevance, section 204(d) of the Act gave the Emergency Court of Appeals (and the Supreme Court, on review of the Emergency Court's judgments):

> exclusive jurisdiction to determine the validity of any regulation or order . . . Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

EPCA § 204(d), 56 Stat. at 33. At the time that EPCA was introduced in Congress, members of the Executive Branch drafted an explanation of its

provisions. With respect to the "exclusive jurisdiction" provision, they said the following:

> The exclusive jurisdiction of the emergency court of appeals extends only to the review of price or rent ceiling regulations or orders and the suspension or revocation of licenses. Because of the opportunity provided for immediate review in the emergency court of such regulations or orders it is proper that their validity should not be questioned in any other court or in any collateral proceeding. Of course, the question whether there has been a violation of a ceiling regulation is subject to judicial determination in criminal or civil proceedings to enforce the statute, unless it has already been determined in proceedings for suspension or revocation of a license. Other regulations under the proposed statute are subject to review in the ordinary courts, in accordance with the applicable principles of law, in the same manner and to the same extent as the rules and regulations of other Federal administrative agencies.

Price-Control Bill, Hearings before the Committee on Banking and Currency, House of Representatives, 77th Cong., 1st Sess. 340 (Aug. 8, 1942); *see id.* at 171 (remarks of Leon Henderson, Administrator, Office of Price Administration). The Executive Branch's analysis thus distinguished certain regulations that would be subject to the "exclusive jurisdiction" provision from regulations reviewable "in the same

manner and to the same extent as the rules and regulations of other Federal administrative agencies."

In *Yakus*, the Court addressed the question whether section 204(d) of the Act "preclude[d] consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation." 321 U.S. at 418. The Court observed that, in *Lockerty v. Phillips*, 319 U.S. 182 (1943), it had previously held that the "exclusive jurisdiction" provisions gave the Emergency Court of Appeals "exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrators and that they withdrew such jurisdiction from all other courts." 321 U.S. at 429; *see Lockerty*, 319 U.S. at 187-89 (holding that EPCA's "exclusive jurisdiction" provision barred wholesale meat dealers from suing to restrain the U.S. attorney from prosecuting them for violations of price regulations). The Court reasoned that, for the same reasons as in *Lockerty*, it reached "the like conclusion as to [district court] power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation." 321 U.S. at 429. The provisions authorizing the Emergency Court of Appeals to "determine the validity" of orders and regulations and stripping other courts of jurisdiction "to consider the validity" of such orders and regulations, according to the Court, were "broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation." *Id.* at 430.

In reaching this conclusion, the *Yakus* Court relied on language from the Senate Report

accompanying the Emergency Price Control Act and a change that Congress made to the Act during its drafting. The Report of the Senate Committee on Banking and Currency observed that "[t]he courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court to determine the constitutional validity of the statute itself." Sen. Rep. 931, 77th Cong., 2d Sess., p. 25. Indeed, Congress had changed the language of the Act during the drafting process. As *Yakus* noted, "the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves." 321 U.S. at 430 (citing H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H.R. 5479, pp. 4, 7, 8). According to *Yakus*, the Report and the alteration manifested Congress' intent "to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a criminal prosecution." 321 U.S. at 430. *Yakus* thus construed the Act to establish that "the validity of the Administrator's regulations or orders should not be subject to attach in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute." *Id.* at 430-31.

Shortly after this Court decided *Yakus*, Congress enacted the Stabilization Extension Act to mitigate some of the harshness of the Court's interpretation of the EPCA's review mechanisms. The Stabilization Extension Act, for example, removed the time period

for filing protests with the Price Administrator and permitted a defendant to file a protest following the initiation of the Price Administrator's enforcement suit, so long as the defendant could establish a "reasonable and substantial excuse" for failing to bring an earlier protest. 58 Stat. at 639. In enacting these legislative fixes, Congress implicitly ratified the *Yakus* Court's construction of the term "determine the validity of," while at the same time softening the ramifications of that construction.

3. The Administrative Procedure Act.

In 1946, Congress enacted the Administrative Procedure Act ("APA"). 60 Stat. 237 (1946). In the APA, Congress echoed some of the terminology used in the Urgent Deficiencies Act by authorizing a reviewing court to "(A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and *set aside* agency action, findings and conclusions under specified circumstances." § 10(e), 60 Stat. at 243 (codified at 5 U.S.C. § 706) (emphasis added). Congress also provided that "agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement," unless "prior, adequate, and exclusive opportunity for judicial review is provided by law." § 10(b), 60 Stat. at 243 (codified at 5 U.S.C. § 703).

In 1947, Attorney General Tom C. Clark published a manual — known as the *Attorney General's Manual on the Administrative Procedure Act* — providing the Department of Justice's interpretation of these provisions. With respect to the latter, the Attorney General's Manual stated that a statute may "expressly provide for an exclusive method of judicial review which precludes challenge

of agency action in enforcement proceedings" and cited section 204(d) of the EPCA. *Id.* at 99 & n.13. The Manual acknowledged that "[t]here are many situations in which the invalidity of agency action may be set up as a defense in enforcement proceedings." *Id.* at 100.

4. Administrative Orders Review Act.

The Hobbs Act had its genesis in a request from Chief Justice Harlan Fiske Stone that members of the Judicial Conference of Senior Circuit Judges study the procedure for judicial review of orders by the ICC and other agencies. *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts*, Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1470, and H.R. 2271, 80th Cong., at 27 (Mar. 17, 1947) (hereinafter, "*Hobbs Act Committee Hearings*") (remarks of Judge Orie Phillips) (observing that the proposed legislation "had their beginning in a request made by the late Chief Justice Stone, that the judicial conference make a study of the procedure for review of administrative orders under the Urgent Deficiencies Act"). Under then-existing law, certain agency orders were reviewed by a three-judge district court and appealable as of right to the Supreme Court. *See id.*; *see also Report of the Judicial Conference of Senior Circuit Judges* 17 (1942) (noting that the appointed committee consisted of Judges Learned Hand, Calvert Magruder, Armistead Dobie, and Walter Lindley and ICC Commissioner Clyde B. Aitchison). After being appointed in 1942, the

Judicial Conference's committee initially split into two, with one part addressing proposed legislation providing for a uniform method of assembling three-judge district courts and another part addressing proposed legislation providing for appellate review of administrative orders. *See Report of the Judicial Conference of Senior Circuit Judges* 20-21 (1943) (noting that, in 1943, Judge Albert Maris presented the views of the first committee and that the two committees were then consolidated into a single committee chaired by Judge Orie Phillips). In 1944, the committee recommended a draft bill that (in the words of Chief Justice Stone) gave "to the Circuit Courts of Appeals . . . exclusive jurisdiction to enjoin or set aside certain specified orders of the Interstate Commerce Commission." *Report of the Judicial Conference of Senior Circuit Judges* 12 (1944).

The following year, in 1945, the Judicial Conference approved the draft bill for the ICC, and considered another proposed bill to regularize review of certain orders "of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, and the Perishable Agricultural Commodities Act, 1930, certain orders by the Federal Communications Commission under the Communications Act of 1934, and certain orders by the United States Maritime Commission under the Shipping Act of 1916." *Report of the Judicial Conference of Senior Circuit Judges* 12 (1945). In 1946, the Judicial Conference accepted a request of the United States Maritime Commission to amend the ICC proposal to "bring orders of that agency within the provisions of the bill." *Report of the Judicial Conference of Senior Circuit Judges* 17 (1946). In addition, the Conference recommended adoption of a bill giving the circuit courts "exclusive

jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Federal Communications Commission made under the Communications Act of 1934, as amended, and certain orders of the Secretary of Agriculture made under the Packers and Stockyards Act of 1921, as amended, and under the Perishable Agricultural Commodities Act of 1930, as amended." *Id.* (As is made clear by this sequence of events, this third recommendation adopted the "determine the validity of" language that found its way into the final Act.)

For these reasons, when the Judicial Conference finally presented legislation to Congress in 1947, it did so in the form of three separate bills. *See Hobbs Act Committee Hearings* 1, 5 (Mar. 7, 1947); *see also Report of the Judicial Conference of Senior Circuit Judges* 19 (1947) (noting that the Conference had approved "three legislative proposals, one with respect to review of certain orders of the [ICC] and the United States Maritime Commission, one with respect to review of certain orders of the Federal Communications Commission and the Secretary of the Agriculture, and one amending certain provisions of the Urgent Deficiencies Act, and providing a uniform procedure for constituting three-judge district courts" and that Judge Phillips "submitted the report of the Committee concerning the status of these Conference proposals" to Congress). Specifically, the review provision for proposed H.R. 1468 gave circuit courts "exclusive jurisdiction to enjoin, set aside, or suspend in whole or in part [certain] final orders" of the ICC and United States Maritime Commission. *Hobbs Act Committee Hearings* 21 (Mar. 17, 1947); *see also id.* at 22-24. By contrast, the review provision for proposed H.R. 1470 gave circuit courts "exclusive

jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" of the FCC and the Secretary of Agriculture. *Id.* at 24; *see also id.* at 25-26.

After several years of consideration, Congress combined the relevant portions of the three bills into a single statute that became the Hobbs Act — authorizing review of the Federal Communications Commission, the Secretary of Agriculture, and the United States Maritime Commission. *See Report of the Judicial Conference of Senior Circuit Judges* 222 (1950). In doing so, Congress used the broader language contained in the original H.R. 1470, giving circuit courts "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all [listed] final orders." H.R. 5487, 81st Cong., 1st Sess. (introduced by Rep. Hobbs on July 5, 1949).

As a result, comparable to the EPCA, the enacted Hobbs Act granted a "party aggrieved" by an order the right to petition within 60 days from the order's entry, § 4, 64 Stat. at 1130 (codified at 28 U.S.C. § 2344), and thereby bring an action "against the United States" in the "judicial circuit in which the petitioner resides or has its principal office" or in the D.C. Circuit, § 3, 64 Stat. at 1130 (codified at 28 U.S.C. § 2343). The courts of appeals were given "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain final orders, § 2, 64 Stat. at 1129, including those involving the FCC in this case, *see* Pet. Br. 7-13; *see also* 28 U.S.C. § 2349(a) (authorizing the court of appeals to enter a "judgment determining the validity of, and enjoining, setting

aside, or suspending, in whole or in part, the order of the agency").

ARGUMENT

"[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Justice Frankfurter's maxim all but decides this case. Here, the most plausible interpretation of the Hobbs Act is that Congress in 1950 incorporated the similar language used in the EPCA in 1942. As a result, the term "determine the validity of," as used in the Hobbs Act, carries the same meaning given to it under the EPCA — as well as the same limitations. That statutory term prohibits a district court from "determining the validity of" a regulation where, as in *Yakus*, a violation of the regulation is made an element of a crime or civil action. In such a case, a district court cannot reject any interpretation contained in the regulation without declaring the regulation invalid, because the statute itself is predicated on violating the regulation. But the Hobbs Act does not prohibit a district court from interpreting statutory text in other circumstances.

A. The Hobbs Act's use of the term "determine the validity of" incorporated preexisting statutory usage.

For several reasons, the most plausible inference is that the Hobbs Act's use of the term "determine the validity of" was intended to mimic the term's use in the EPCA.

For one thing, the EPCA was the only statutory review provision that had, to that date, used this terminology. That fact, in itself, is highly salient. In general, statutory provisions ought to be interpreted in a consistent fashion. *See* Caleb Nelson, *Statutory Interpretation* 486-525 (2011) (discussing the notion that "statutes address[ing] the same subject" might be read "*in pari materia*" such that "courts construing one statute should seek guidance from other related statutes"); *see Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion of Scalia, J.); *cf. Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (indicating that the *in pari materia* canon, meaning the presumption that "a legislative body uses a particular word with a consistent meaning in a given context," is at its strongest "when the statutes were enacted by the same legislative body at the same time"). But where the statutory language is unusual for the context, there is every reason to believe the later-enacted statute was copied from (and intended to have the same meaning as) the earlier statute.

For another, cases involving the Emergency Price Control Act (and the Office of Price Administration's enforcement of it) could not have been more squarely in the public eye in the years preceding Congress's consideration and enactment of the Hobbs Act. For example, in 1944, 38,499 civil cases were commenced in federal district courts. *See* Report of the Judicial Conference of Senior Circuit Judges 6 (1945). That number increased to 60,965 in 1945 and 67,835 in 1946. *See id.* at 6. As the Judicial Conference observed, "[t]he phenomenal increase in the number of [civil] cases filed [in district courts] during the past two years is accounted for by the 28,653 civil cases commenced by the Office of Price Administration in

1945 and the 31,252 cases in 1946." *Id.* As a result, in 1946, "almost half of [all civil] cases were brought by the Office of Price Administration for enforcement of price control and rationing regulations." *Id.* at 5.

For yet another reason, there is evidence in the legislative record suggesting that informed observers would have understood the Hobbs Act's use of the language "determine the validity of" to be the same as the Emergency Price Control Act's use. An extensive objection at the 1947 subcommittee hearings indicates how at least one private attorney understood the Hobbs Act's language:

> I think Your Honors will recall in your deliberations on the Administrative Procedure Act that a strong contention had been made that it was inherently wrong in our country that a man could be indicted criminally for the violation of an administrative order and then not be permitted to defend himself on the ground that the order itself was invalid because beyond the authority of the agency to make it.
>
> That was an evil that had been developing in our country, the tendency being to say, "Well, you at least committed a crime because you violated the order. Maybe the order was no good, but you violated it."
>
> That was not quite a fair presentation, because so many of these orders, in the many of their wording, leave a layman in

a great deal of doubt as to just what his rights and duties are.

So, Your Honors, then, in the enactment of the Administrative Procedure Act, section 10, paragraph (b), provided, and we were all delighted with it, that the validity of an administrative order may be challenged by way of defense in a criminal proceeding brought to enforce such an order, under these conditions, being, namely, that there has not previously existed an adequate exclusive remedy of a different kind.

. . .

Now, in this legislation before Your Honors, I do not suppose with any deep-dyed plot, nonetheless I have observed that it is expressly provided that the system of review here set up shall be exclusive.

Now, that is not mere accident.

Were that concept to be continued in this legislation, should Your Honors pass it, it is the death knell again, before the ink is hardly dry, to the Administrative Procedure Act. It is the death knell to the opportunity of a defendant to say, "Well, if I did violate the order innocently, then the order itself was not a valid order." You are taking from him that right of defense in a criminal action, and I do not believe Your Honors would

> wish to do so so soon after the Administrative Procedure Act.

Hobbs Act Committee Hearings 45-46 (Mar. 17, 1947) (remarks of Mr. Charles Cotterill). No action appears to have been taken in light of these remarks, though there are scattered comments in the record suggesting concern about the proposed legislation's consistency with the Administrative Procedure Act. *See id.* at 113 (Mar. 10, 1949) (suggesting that Rep. Francis Walter, one of the APA's proponents, expressed such a concern); *id.* at 149 (Apr. 1, 1949). To be sure, *amicus* believes that the aforementioned remarks were merely those of a private attorney and by no means ought to be privileged in the search for the meaning of the Hobbs Act. But they cast light on what an informed observer might have thought the terms of the Act meant, in context, when Congress enacted the statute in 1950.

Finally, it is worth noting that the EPCA and the Hobbs Act are different in certain respects. For one thing, as the *Yakus* Court noted, the EPCA was a wartime measure; the Hobbs Act is not. For another, EPCA had a "belt and suspenders" aspect that the Hobbs Act lacks. The EPCA gave the Emergency Court of Appeals "exclusive jurisdiction to determine the validity of any regulation or order," while denying to other courts "jurisdiction or power to consider the validity of any such regulation, order, or price schedule." EPCA § 204(d), 56 Stat. at 33. The Hobbs Act lacks this "consider the validity" language.

Nevertheless, on balance and against the full backdrop, the most plausible inference is that the drafters of the Hobbs Act borrowed the "determine the validity of" language from the Emergency Price

Control Act. While the wartime nature of the EPCA is surely significant when it comes to the statute's constitutionality, it is unclear why it should have any significance on the question of the meaning of a statute. Moreover, while it is true that the Hobbs Act lacks the "belt and suspenders" quality of the EPCA, it is unclear why that should affect the proper interpretation of the terms that the Hobbs Act does contain: "Exclusive jurisdiction" to "determine the validity." At the end of the day, the most plausible inference is that informed members of the public would have understood the Hobbs Act's language to have essentially the same import as the same language from the Emergency Price Control Act — and to incorporate the holding of *Yakus*.

B. A court does not "determine the validity of" a regulation by disagreeing with the interpretation embraced in the regulation.

Just as the Hobbs Act incorporates the preexisting gloss on the terms "determine the validity," so too does it incorporate the preexisting limits imposed on those terms. In this instance, the critical limit is the distinction between a regulation that is made the predicate for a statutory violation, criminal or civil, and a regulation that merely interprets statutory text. In the former case, *Yakus* holds that a defense arguing that the regulation is invalid would ask the district court to "determine the validity of" the regulation. In the latter case, at the time of the Hobbs Act's enactment, the natural understanding would have been that mere judicial disagreement with an interpretation embraced by a

regulation does not call that regulation's "validity" into doubt.

First, the text of the Hobbs Act supports this interpretation. It grants courts of appeals the "exclusive jurisdiction" to "determine the validity of" agency regulations, thereby precluding district courts from doing the same. 28 U.S.C. § 2342. The text, however, does not suggest that district courts are precluded from taking actions with the "effect" of questioning the validity of an interpretation embraced by a regulation. The narrower language — "determine the validity of" — naturally encompasses fact patterns like the one at issue in *Yakus*, while leaving to district courts the ordinary judicial task of statutory interpretation.

Second, precedent supports this interpretation. Take *Yakus*, for example. The Court made clear that its holding was tied to the statutory scheme established by the EPCA, which "ma[de] criminal the violation of an administrative regulation, by one who has failed to avail himself" of separate procedures for appeal. 321 U.S. at 444. The Court repeatedly stressed this aspect of the EPCA, noting that the "indictment charged a violation of the regulation," *id.* at 447, that the district court was tasked with finding a "violation" of the regulation, *id.* at 444, and that the procedure was one in "which violation of a price regulation is made penal," *id.* at 446.

This Court's cases interpreting the Hobbs Act are to the same effect. *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), addressed a lawsuit for damages under a port agreement approved by the Federal Maritime Commission, in which a defendant sought to assert a

defense that the agreement was invalid. *See id.* at 64-65 (noting that the Terminal Association brought a state-court action for damages and declaratory relief against the Boston Shipping Association, which defended on the ground that the revised tariff was invalid). Like *Yakus*, *Port of Boston* thus addressed a circumstance where the validity of the very "regulation" (in that case, a port agreement) was necessary to establish the elements of the common-law claim at issue in the lawsuit. *See* 420 F.3d 419 (1st Cir. 1970) (recounting facts). Like *Yakus*, *Port of Boston* thus illustrates that the Hobbs Act can have preclusive effect outside of the context of actions for injunctive or declaratory relief against the government. *See* 400 U.S. at 69. And most importantly, like *Yakus*, *Port of Boston* illustrates the limit to the application of the Hobbs Act: The lawsuit was about the validity of a tariff that formed the basis for recovery, not the appropriate interpretation of a statute.

Other cases involve a party seeking equitable or injunctive relief against the government, which brings it within the Hobbs Act's prohibitions on obtaining district-court relief to "enjoin," "set aside," or "suspend" a regulation. In *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), a company filed suit in district court "to enjoin action that is the outcome of [an FCC] order," *id.* at 468, thus naturally triggering application of the Hobbs Act's term. *Cf. ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1965).

Third, interpreting the "determine the validity of" language in the Hobbs Act more broadly would pose constitutional difficulties. *See, e.g.*, *Mendoza-Lopez*, 481 at 839 n.15; *Adamo Wrecking*, 434 U.S. at 289-91 (Powell, J., concurring). As the D.C. Circuit has put it, "[t]he nagging presence of a substantial due process question" with respect to preclusive review provisions "indicates, then, at the very least, the propriety of a narrow interpretation of" the statute. *Chrysler Corp v. EPA*, 600 F.2d 904 (D.C. Cir. 1979).

Fourth, broader jurisprudential principles regarding the relationship between statutory meaning and agency regulatory authority support this construction of the Hobbs Act. Any argument that judicial disagreement with a regulation's interpretation calls into doubt the regulation's "validity" necessarily depends on the notion that a court must adopt the agency's regulatory interpretation under certain circumstances. Put differently, a necessary premise to the Fourth Circuit's decision below is that a court addresses the "validity" of an agency regulation any time that it interprets the relevant statute. That premise itself rests on a further premise that the interpretations set forth in agency rules must be accorded weight by reviewing courts under appropriate circumstances. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). (Were the Court not to give weight to agency interpretations under *Chevron*, nobody would argue that a district court's construction of a statute "determine[d] the validity of" an agency regulation saying the contrary.)

There is ample reason to believe, however, that *Chevron* departs from the prevailing views on

statutory interpretation at the time of the APA's, and hence the Hobbs Act's, adoption. *See, e.g., Fast v. DiSalle*, 193 F.2d 181, 184 (Emergency Ct. App. 1951) (stating that "complainants are quite wrong in supposing that . . . the enforcement court would be bound to assume the correctness and validity of the enforcement director's interpretation of the regulation," but rather "[t]he enforcement court would have to make its own independent determination of a question of law, as to whether . . . the regulation, properly interpreted, authorized the price increases in question"); *see generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).

A holding contrary to the one set forth above, thus, has the potential to import the entire *Chevron* framework into the jurisdictional analysis under the Hobbs Act. That is because, on the theory that would underlie such a holding, a reviewing court could be viewed as calling into question the regulation's "validity" *only if* the ordinarily applicable principles required the court to defer to the agency's regulatory interpretation.

Jurisdictional issues should be clear. *Hertz Corp v. Friend*, 559 U.S. 77, 96 (2010). Whatever the merits of the *Chevron* framework, its application is not clear. Respectfully, the court should hesitate before making the Hobbs Act's jurisdictional rules turn on the applicability of the *Chevron* doctrine.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF RESPONDENT

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Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 FCC Rcd. 6927 (2007) 14

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2003 Order), 18 FCC Rcd. 14,014 (2003) 18, 19

In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2008 Order), 23 FCC Rcd. 559 (2008) 19

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391 (2012) 19

In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961 (2015), *set aside in part, ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) 19

Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton (2018) 17

Nat'l Consumer Law Ctr. et al., Comments on the Petition for Declaratory Ruling of the Consumer Bankers Ass'n, CG Docket No. 02-278 (filed Nov. 17, 2014) 13

Noam Cohen, *There's No App for Justice*, New Republic (Apr. 25, 2018) 11

Open Secrets, *Top Spenders* (2019) 7

Press Release, Fed. Commc'ns Comm'n, FCC Adopts Rules to Allow Phone Companies to Proactively Block Illegal Robocalls (Nov. 16, 2017). 17

Ryan Singel, Stanford Ctr. for Internet & Soc'y, *Filtering Out the Bots: What Americans Actually Told the FCC about Net Neutrality Repeal* (2018) 11

U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017) 12

YouMail, *Historical Robocalls by Time.* 17

INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C.[1] EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC has filed numerous briefs before this Court, over the past 25 years, in cases concerning the protection of privacy. *See, e.g.*, Brief of *Amicus Curiae* EPIC et al., *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402) (arguing that technological changes since the era of analog phones justify departing from the third party doctrine); Brief of *Amici Curiae* EPIC et. al, *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); Brief of *Amici Curiae* EPIC et. al, *NASA v. Nelson*, 562 U.S. 134 (2011) (No. 09-530) (arguing that the Court should recognize the right to informational privacy); Brief of *Amicus Curiae* EPIC, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (arguing that the Driver's Privacy Protection Act is constitutional and creates a baseline standard for driver privacy).

EPIC also routinely participates as *amicus curiae* in cases concerning the Telephone Consumer Protection Act and other important consumer privacy laws,

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[1] Both parties consent to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

including in cases brought under the Hobbs Act. *See, e.g.*, Brief of *Amicus Curiae* EPIC, *Steven Gallion v. Charter Communications, Inc., et al.*, No. 5:17-cv-01361, 287 F. Supp. 3d 920 (C.D. Cal. 2018), *appeal docketed*, No. 18-55667 (9th Cir. May 23, 2018) (arguing that the TCPA protects important consumer privacy interests and has become more necessary as telephone technology has evolved); Brief of *Amici Curiae* EPIC et al., *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211) (arguing that the TCPA prohibits invasive business practices and that the companies, not consumers, bear the burden of complying with the statute); Brief of *Amici Curiae* EPIC et al., *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (arguing that the FCC's opt-in rule for disclosing customer proprietary network information was constitutional).

EPIC has provided expert analysis to Congress on emerging consumer privacy issues concerning the misuse of telephone customer information. *See, e.g., Telephone Advertising and Consumer Rights Act, H.R. 1304: Hearing Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 43 (April 24, 1991) (testimony of Marc Rotenberg, Exec. Dir., EPIC);[2] *S. 1963, The Wireless 411 Privacy Act: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 108th Cong., 2d Sess. (Sept. 21, 2004) (testimony of Marc Rotenberg, Exec. Dir., EPIC);[3] *Modernizing the Telephone Consumer Protection Act: Hearing Before the Subcomm. on Commc'ns. & Tech. of the H. Comm. on Energy and*

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[2] http://www.c-span.org/video/?18726-1/telephone-solicitation.

[3] https://epic.org/privacy/wireless/dirtest_904.html.

Commerce, 114th Cong. (2016) (letter for the record submitted by EPIC);[4] *Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 115th Cong. (Apr. 18, 2018) (letter for the record submitted by EPIC).[5]

EPIC also routinely submits comments and petitions to federal agencies on the implementation of the Telephone Consumer Protection Act and other privacy statutes. *See, e.g.*, EPIC et al., Comments in the Matter of Telemarketing Rulemaking, FTC File No. R411001 (2002);[6] EPIC et al., Comments in the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (2002);[7] EPIC et al., Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-1346 et al. (2005);[8] EPIC, Comments on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Docket Nos. CG 02-278, DA 05-2975 (2006);[9] EPIC et al., Comments on the Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Apr. 28, 2006); EPIC, Comments In the Matter of ACA

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[4] https://epic.org/privacy/telemarketing/EPIC-Modernizing-TCPA.pdf.

[5] https://epic.org/EPIC-SCOM-Robocalls-April2018.pdf.

[6] https://epic.org/privacy/telemarketing/tsrcomments.html.

[7] https://epic.org/privacy/telemarketing/tcpacomments.html.

[8] https://epic.org/privacy/telemarketing/tcpacomm7.29.05.html.

[9] https://epic.org/privacy/telemarketing/tcpacom11306.html.

International Petition for Expedited Clarification, Docket No. 02-278 (2006);[10] EPIC, Comments Concerning Implementation of the Junk Fax Prevention Act, CG Docket No. 05–338 (2006);[11] EPIC, Comments Concerning Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (2017);[12] EPIC, Comments Concerning the Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, DA Docket No. 18-493 (2018);[13] EPIC, Comments Concerning the Refreshed Record on Advanced Methods to Target and Eliminate Unlawful Robocalls, CG Docket No. 17-59 (2018).[14]

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[10] https://epic.org/privacy/telemarketing/fcc_aca_05-11-06.html.

[11] https://epic.org/privacy/telemarketing/jfpacom11806.html.

[12] https://epic.org/apa/comments/EPIC-FCC-Robocall-Comments.pdf.

[13] https://epic.org/apa/comments/EPIC-FCC-TCPA-June2018.pdf. EPIC also filed reply comments on the same docket: https://epic.org/apa/comments/EPIC-FCC-TCPA-ReplyComments-June2018.pdf.

[14] https://epic.org/apa/comments/EPIC-FCC-Robocalls-Refresh-Sept2018.pdf.

SUMMARY OF THE ARGUMENT

The Federal Communications Commission ("FCC") is responsible for administering the Telephone Consumer Protection Act ("TCPA") and other consumer protection laws that safeguard communications privacy. Like many consumer privacy laws, the TCPA has a private right of action to ensure vigorous enforcement. Congress also granted the FCC authority to implement the statute and to "prescribe regulations to implement the requirements" of the law. 47 U.S.C. § 227(b)(2). Any person can participate in the agency's rulemakings and adjudications through the APA notice and comment process. *See* 5 U.S.C. § 551 *et seq.* Congress also provided a mechanism to seek judicial review of FCC orders in the Hobbs Act. 28 U.S.C. § 2342(1). The end result is a set of regulations and interpretive orders that guide consumers, businesses, and other interested parties who might have claims or disputes arising under the TCPA. The question in this case is whether a business that has been sued for violating the TCPA can offer a defense based on an interpretation of the law that is contrary to a current, valid interpretation promulgated by the FCC. In EPIC's view, this outcome would be contrary to the well-established purposes of the Administrative Procedures Act.

A key advantage of administering these laws through the agency rulemaking and adjudication process is that members of the public have the opportunity to meaningfully comment on agency action and have a prompt and coordinated mechanism for judicial review. In the Hobbs Act, Congress decided to channel judicial review of FCC and other agency orders to the courts of appeals on an expedited 60-day timeline. As

a result, those individuals and groups who participate in the agency's notice and comment process can participate in final judicial review of the rules and regulations. This process not only facilitates public participation, it also enables the development of uniform standards to govern private enforcement through civil litigation.

The Court should deny the petition and affirm the lower court's ruling. First, permitting trial courts to interpret the TCPA in ways that contradict existing FCC interpretations will exclude the voices of consumers and related groups who are engaged at the agency level and will undermine the purpose of the notice-and-comment process. And second, authorizing collateral attacks on FCC orders will primarily redound to the benefit of those parties who have resources to attack FCC rules that are favorable to the public.

ARGUMENT

The Telephone Consumer Protection Act ("TCPA") created a general prohibition on business's use of automated or prerecorded telephone calls and unsolicited faxes, with narrow exceptions. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227). In enacting the TCPA, Congress found that a general prohibition was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Id.*

Companies that choose to engage in the business practices restricted by the TCPA have an obligation to act within the law—and to seek clarification from the FCC if they believe the law is unclear. Companies have various tools available to them, including

petitioning the FCC for a declaratory ruling under 47 C.F.R. § 1.2 (in accordance with 5 U.S.C. § 554) and petitioning for the "issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e); *see also* 47 C.F.R. § 1.1. If any person wishes to challenge the validity of an FCC order or rulemaking, they can do so by filing a petition for review in a court of appeals under the Hobbs Act. 28 U.S.C. § 2342(1). Petitions for review can be filed either by the original parties to an FCC proceeding or by others who commented on a proceeding. *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 711 (D.C. Cir. 2018) (concerning multiple petitions for review of an FCC order consolidated in the D.C. Circuit).

Any company whose business practices are implicated by the TCPA thus has ample opportunity to advocate their interests throughout the administrative process. And these companies are not just represented individually; they are also represented by local and national trade groups including the U.S. Chamber of Commerce, the largest lobbying association in the United States. Open Secrets, *Top Spenders* (2019).[15] Some companies choose to use automated calling and messaging services—they are not obligated to do so. Congress determined that entities that use automated calling and messaging services—and not telephone subscribers—should bear the burden of limiting unwanted calls. Those obligations are set forth in the FCC's regulations and declaratory judgments interpreting and applying the TCPA, and Congress directed that such orders should be reviewed pursuant to the Hobbs Act.

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[15] http://www.opensecrets.org/lobby/top.php?showYear=a&indexType=s.

I. The rulemaking process enables the public to meaningfully participate in federal agency decision-making.

Congress gave the FCC authority to implement the TCPA through rulemaking and adjudication. *See* 47 U.S.C. § 227(b)(2). And Congress expected that the views of the public would be incorporated in the decisions of federal agencies. Under the Administrative Procedures Act ("APA"), agencies are required to provide the public with notice of a proposed rule, followed by "an opportunity to participate" in the rulemaking, known as "notice-and-comment" rulemaking. 5 U.S.C. § 553. The APA also gives any person the right to petition for a new rule or modification to an existing rule. 5 U.S.C. § 553(e). In the resulting rule's "concise general statement," 5 U.S.C. § 553(c), the agency cannot "leave vital questions, raised by comments which are of cogent materiality, completely unanswered." *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977). Rather, the agency has a duty to provide a reasoned explanation of its decision by addressing the "major issues" raised by the public's comments. *Id.* (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). The FCC has made it especially easy for the public to submit comments and petitions through the agency's electronic docketing system. *See* Fed. Commc'ns Comm'n, *ECFS Express Comment* (2019).[16] Public participation in recent agency proceedings shows that public participation is central to the implementation of consumer protection laws.

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[16] https://www.fcc.gov/ecfs/filings/express.

Congress enacted the Hobbs Act to channel judicial review of FCC orders through the courts of appeals. 28 U.S.C. § 2342(1). If more than one petition is filed, the actions are consolidated in one court. 28 U.S.C. § 2112(a). That means that any person who participated in the agency proceedings could reasonably track one case challenging a rule in order to ensure that their interests are represented during the judicial review process. Indeed, consumer groups frequently participate as *amici curiae* in Hobbs Act challenges to FCC orders. *See, e.g., ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (twelve consumer groups participating as amici curiae); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996 (D.C. Cir. 2009) (eleven consumer protection groups participating as amici curiae). Public interest groups often petition the agency for modification of orders that do not adequately protect consumers. Business groups have similarly stepped in to participate in such proceedings. History demonstrates that the notice and comment process is essential to enable public participation in the administration of consumer protection laws.

In contrast, allowing defendants to challenge FCC orders in private enforcement actions would force the public, including consumer advocates, to identify, track, and attempt to intervene or participate in scattered proceedings across the country. The costs of participating would be prohibitive for most consumer groups and would diminish the public voice in the implementation of consumer protection laws.

The FCC's notice and comment process is designed to ensure public participation in agency proceedings. 1 Admin. L. & Prac. § 4:33 (3d ed. 2019). The FCC is required to publish its notices in the Federal

Register. 5 U.S.C. § 553(b). The FCC's free Electronic Comment Filing System also allows the public to search for proceedings, Fed. Commc'ns Comm'n, *ECFS: Search for Proceedings* (2019),[17] and browse popular ones, Fed. Commc'ns Comm'n, *ECFS: Browse Popular Proceedings* (2019).[18] In addition to a standard online form for filing comments and petitions, Fed. Commc'ns Comm'n, *ECFS Submit a Filing* (2019),[19] the FCC's ECFS system also gives consumers the option to submit an "Express" comment with a simplified, easy-to-use form. Fed. Commc'ns Comm'n, *ECFS Express Comment* (2019).[20] The FCC's website even features advice for how consumers can prepare effective comments. Fed. Commc'ns Comm'n, *Rulemaking Process* (2019).[21]

The extraordinary number of comments the FCC has received in recent rulemakings shows that the public wants their voice heard on important consumer protection issues. For example, over 220,000 comments were submitted electronically during the FCC's 2016 broadband privacy rulemaking. *See* Filings, Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, FCC Dkt. No. 16-106 (2016) (listing comments submitted between May 27, 2016 and July 6, 2016).[22] Public

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[17] https://www.fcc.gov/ecfs/search-proceedings.

[18] https://www.fcc.gov/ecfs/browse-popular-proceedings.

[19] https://www.fcc.gov/ecfs/filings/express.

[20] https://www.fcc.gov/ecfs/filings/express.

[21] https://www.fcc.gov/about-fcc/rulemaking-process.

[22] https://www.fcc.gov/ecfs/search/filings?date_received=%5Bgte%5D2016-5-27%5Blte%5D2016-7-6&proceedings_name=16-106&sort=date_disseminated,DESC&submissiontype_description=COMMENT.

interest also swelled during the FCC's 2017 net neutrality rulemaking—a report from Stanford University found that more than 800,000 unique comments were filed by the public, in addition to millions of form comments submitted automatically in an attempt to disrupt the public comment process. Ryan Singel, Stanford Ctr. for Internet & Soc'y, *Filtering Out the Bots: What Americans Actually Told the FCC about Net Neutrality Repeal* (2018).[23]

Meanwhile, the public faces substantial—and for most, insurmountable—barriers to participating in court proceedings as *amici curiae*. First, there is the obvious barrier that only licensed attorneys may file *amicus curiae* briefs in U.S. courts. Interested non-attorneys must hire counsel to file on their behalf, which is an expensive endeavor. Second, identifying and tracking cases of interest is expensive, time-consuming, and requires familiarity with federal dockets and the rules of appealability. To identify relevant cases, an interested person would have to either subscribe to a commercial legal research service or pay search fees to wade through hundreds of public court records. *See* Noam Cohen, *There's No App for Justice*, New Republic (Apr. 25, 2018) (calling Lexis and Westlaw "expensive services, imposing yet another layer of fees onto the already costly practice of law");[24] Admin. Office of the U.S. Courts, *Elec. Public Access Fee Schedule* (2017).[25] Even if an individual manages to find a

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[23] https://cyberlaw.stanford.edu/files/blogs/FilteringOutTheBotsUniqueNetNeutralityComments.pdf.

[24] https://newrepublic.com/article/147795/theres-no-app-justice-silicon-valley-startups.

[25] https://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule.

relevant case, they would need to be familiar with the local rules to determine whether and when *amicus* participation or third-party intervention is permitted. And all of these steps would need to be repeated for each new case that might result in modification of an FCC rule. In the context of TCPA litigation, the tasks of tracking all relevant cases is especially daunting: between August 1, 2015 and December 31, 2016, at least 3,212 TCPA cases were filed in 42 states. U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 2, 16 (Aug. 2017).[26]

In the past, public interest groups have successfully used the agency process to advocate for rules that protect consumers—and have participated in Hobbs Act judicial review when these rules have been challenged. A recent example is *ACA International*, concerning the FCC order interpreting the TCPA's autodialer restrictions. Consumer advocacy groups submitted comments in the FCC proceedings. *See, e.g.*, Consumers Union, Comments on Letter of Nat'l Ass'n of Att'ys Gen. on Call Blocking Technologies, CG Docket No. 02-278 (filed Jan. 23, 2015) (including signatures of 50,000 supporters);[27] Future of Privacy Forum, Comments on the Petition for Exemption of the Am. Bankers Ass'n, CG Docket No. 02-278 (filed Dec. 8, 2014);[28] Nat'l Consumer Law Ctr. et al., Comments on the Petition for Declaratory Ruling of the Consumer Bankers Ass'n, CG Docket No. 02-278 (filed Nov. 17,

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[26] *Available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

[27] https://ecfsapi.fcc.gov/file/60001016154.pdf.

[28] https://ecfsapi.fcc.gov/file/60001008332.pdf.

2014).[29] When companies petitioned for review of the order, EPIC and twelve other consumer groups submitted briefs as *amici curiae*. *See* Brief of *Amici Curiae* EPIC and Six Consumer Privacy Organizations in Support of Respondents, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); Brief of *Amici Curiae* Nat'l Consumer Law Ctr., Nat'l Ass'n of Consumer Advocates Consumers Union, AARP, Consumer Fed'n of America, and MFY Legal Serv.'s, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

Another example is the dispute over whether telecommunications companies had to obtain "opt-in" consent to disclose "customer proprietary network information" ("CPNI") to third parties that culminated in *National Cable & Telecommunications Association v. FCC*, 555 F.3d 996 (D.C. Cir. 2009). When the FCC first promulgated an opt-in rule following passage of the 1996 Telecommunications Act, U.S. West filed a successful Hobbs Act challenge. *U.S. West v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000). The court of appeals held that the agency record did not adequately support the opt-in rule. *Id.* at 1228. The FCC subsequently issued a new order providing for opt-out consent when a carrier shared its data with affiliates, or with joint venture partners or independent contractors for marketing purposes, and an opt-in rule otherwise. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 17 FCC Rcd. 14,860 (2002).

Rather than try to collaterally attack the FCC's opt-out rule through individual civil enforcement

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[29] https://ecfsapi.fcc.gov/file/60000985926.pdf.

actions, public interest groups used the agency rulemaking process to strengthen consumer protections. In response to evidence that data brokers might obtain CPNI by posing as the customer or through other methods, EPIC petitioned the FCC to strengthen its consent rule by requiring carriers to institute security safeguards that would prevent unauthorized access to customer data. EPIC, Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Aug. 30, 2005).[30] The FCC initiated a rulemaking, and EPIC and other consumer protection groups submitted comments. *See, e.g.*, EPIC et al., Comments on the Petition for Rulemaking to Enhance Security and Authentication Standards for Access to Customer Proprietary Network Information, CC Docket No. 96-115 (filed Apr. 28, 2006).[31]

As a consequence of the public rulemaking, the FCC gathered new evidence, established a more comprehensive record, and ultimately issued a new order requiring opt-in consent for carriers to share CPNI with joint venture partners and independent contractors for marketing purposes. Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 FCC Rcd. 6927 (2007). The National Cable and Telecommunications Association ("NCTA") sought judicial review of the new CPNI rule under the Hobbs Act. *See NCTA*, 555 F.3d 996. EPIC and other consumer groups submitted an *amicus curiae* brief to defend the FCC order. Brief of *Amici Curiae* Privacy and Consumer

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[30] https://ecfsapi.fcc.gov/file/6518153274.pdf.

[31] https://ecfsapi.fcc.gov/file/6518334730.pdf.

Organizations, Technical Experts and Legal Scholars in Support of Respondents Urging the Court to Deny the Petition for Review of the FCC's 2007 Order, *NCTA v. FCC*, 555 F.3d 996 (D.C. Cir. 2009). And the D.C. Circuit ultimately upheld the order. *NCTA*, 555 F.3d at 1002. The court also acknowledged EPIC's role in bringing about the FCC's action. As the D.C. Circuit explained:

> The Electronic Privacy Information Center petitioned in 2005 for further rulemaking to modify the Commission's customer information sharing rules. The petition noted the increasing number of "data brokers" -- organizations that sell private information about individuals online -- and expressed concern about how easily these organizations are able to obtain the information from carriers and other entities. Pet. for Rulemaking at 5S8. The petition suggested that data brokers might obtain the information from customer service representatives by pretending to have proper authority to receive it (known as "pretexting"), by gaining unauthorized access to consumers' online accounts with carriers (by hacking, for example), or through "dishonest insiders" working for the carriers. Id. at 1. Concerned that inadequate privacy protections contributed to the data broker problem, the Commission initiated a new rulemaking proceeding, received comments, and issued the Order at issue in this case. See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, 22 F.C.C.R. 6927 (2007).

Id. at 999.

These examples show that both public interest and business groups have the opportunity to participate in the agency process and to seek judicial review. If the development of the CPNI rule occurred outside the APA and Hobbs Act, in a world where defendants were able to challenge FCC orders in private litigation, public interest groups would have had to track private enforcement actions nation-wide where companies sought to challenge the FCC's opt-in rule, and submit *amicus curiae* briefs in each of those actions, to accomplish the same objective it did with just one *amicus curiae* brief. The ability of public interest groups to advocate on behalf of consumers at the FCC is especially important in the robocall context, as discussed below.

II. The FCC orders implementing the TCPA are essential to protect consumers against unwanted robocalls.

American consumers are subjected to an onslaught of unwanted robocalls, and the TCPA is one of the few acts of Congress intended to safeguard the public. Calls initiated by machines, oftentimes interrupting a meeting, a meal, or a solitary moment, have dramatically increased over the last ten years—almost six-fold from 756,000 complaints in 2009 to 4.5 million in 2017, Fed. Trade Comm'n, *Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007* at 3 (Dec. 2017).[32] Unwanted calls—including

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[32] https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial_do_not_call_report_fy_2016-2017_0.pdf.

robocalls—are also the top consumer complaint filed with the FCC. Press Release, Fed. Commc'n Comm'n, FCC Adopts Rules to Allow Phone Companies to Proactively Block Illegal Robocalls (Nov. 16, 2017).[33] YouMail, a provider of robocall blocking software, estimates that nearly 48 billion robocalls were placed in 2018—up from 30 billion in 2017. YouMail, *Historical Robocalls by Time*.[34]

Many of these automated messages also perpetuate fraud. Phone calls—including robocalls—were the method of contact in 70 percent of fraud reports made to the FTC in 2017, with a total of $290 million lost by consumers. Fed. Trade Comm'n, *Consumer Sentinel Network Data Book 2017*, at 12, (Mar. 2018).[35] The FTC calls text message spam a "triple threat" because "[i]t often uses the promise of free gifts or product offers to get you to reveal personal information; it can lead to unwanted charges on your cell phone bill, and it can slow cell phone performance." Fed. Trade Comm'n, *Text Message Spam*, (Mar. 2013).[36] Unwanted text messages "can be used to try to compromise your financial information or to install harmful

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[33] https://apps.fcc.gov/edocs_public/attachmatch/DOC-347787A1.pdf.

[34] https://robocallindex.com/history/time (last visited Feb. 11, 2019).

[35] https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf.

[36] https://www.consumer.ftc.gov/articles/0350-text-message-spam.

software on your mobile device." Kim Boatman, *Stop Cell Phone Spam in Seven Easy Steps*, Norton (2018).[37]

The FCC orders implementing the TCPA are essential to combat unwanted calls. For example, many of the TCPA's robocall restrictions turn on the definition of "automated telephone dialing system" (also known as an "autodialer"). 47 U.S.C. § 227(a)(1). In particular, the TCPA makes it unlawful for any person to make a call (other than a call made for emergency purposes or made with the prior express consent of the called party) to a cell phone using an autodialer or an artificial or prerecorded voice. *Id.* § 227(b)(1)(A)(iii). Congress explicitly provided that the FCC "may, by rule or order" provide an exemption for certain calls "that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect." *Id.* § 227(b)(2)(C). Congress also granted the FCC more general authority to "prescribe regulations to implement the requirements" of the TCPA. *Id.* § 227(b)(2).

Some of the agency's most significant regulatory orders are those that clarify the statutory autodialer definition in response to technological changes (including devices and systems designed to circumvent the TCPA's definition). In 2003 the FCC issued a set of implementing rules and regulations that clarified the scope of the autodialer definition. *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2003 Order), 18 FCC Rcd. 14,014 (2003). As the agency explained, "It is clear from the statutory language and the legislative history that Congress

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[37] https://us.norton.com/yoursecurityresource/detail.jsp?aid=CellPhone.

anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies." *Id.* at 14,092 (citing 137 Cong. Rec. S18784 (1991) (statement of Sen. Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.")). The agency made an important clarification in the 2003 Order: that the autodialer definition must include "predictive dialers" and other devices that have the "capacity to store or produce telephone numbers to be called" to "ensure that he prohibition on autodialed calls not be circumvented." *Id.* at 14,093.

The FCC followed up on that 2003 Order in a declaratory ruling in 2008, which reiterated the determination that predictive dialers fall within the statute's autodialer definition. *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2008 Order), 23 FCC Rcd. 559, 566 (2008). In that order, the Commission affirmed the earlier determination and rejected the argument that predictive dialers do not fall within the statutory definition if they dial from existing lists (as opposed to dialing numbers at random). The FCC reaffirmed again in 2012 that the autodialer definition "covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391, 15392 at n.5 (2012).

When the FCC issued a further declaratory order in 2015, it expanded the definition of autodialer significantly to include equipment even if it does not

have the "present capability" to dial randomly or *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7971, 7977–78 (2015), *set aside in part, ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). After the FCC issued the 2015 Order, the same groups that had argued for a narrower autodialer definition in the 2008 rulemaking filed a Hobbs Act challenge in the D.C. Circuit. As a result of the petitioners' challenge, the court of appeals set aside the FCC order in part in *ACA International, et al. v. FCC*, 885 F.3d 687. In particular, the court found that the expanded definition adopted in the 2015 Order was "incompatible" with the statute because the law could not "reasonably be read to render every smartphone an ATDS subject to the Act's restrictions." *Id.* at 697. Here again, the industry groups had numerous opportunities to present their legal and policy arguments to the Commission, and were ultimately able to obtain partial victory through judicial review. It is hard to understand how these procedures do not provide more than sufficient due process.

But some litigants do not believe that the FCC rulemaking and adjudication process should be the primary mechanism for interpreting the TCPA. There are numerous opinions over the last year—since *ACA International* was decided—in cases where the defendants argued that courts should invalidate the 2003 Order in response to the D.C. Circuit's decision. *See, e.g., Grogan v. Aaron's Inc.*, No. 18-cv-2821, 2018 WL 6040195 (N.D. Ga. Oct. 26, 2018). Many lower courts have already pointed out that invalidating the 2003 Order based on a petition filed in 2015 would ignore the basic structure of the Hobbs Act. Simply put, "the *ACA* decision does not affect the definition of an ATDS as set forth in the FCC's 2003, 2008, or 2012 Orders."

Ramos v. Hopele of Fort Lauderdale, LLC, 334 F. Supp. 3d 1262, 1272 (S.D. Fla. 2018); *see also Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578 (M.D. Tenn. 2018); *Maes v. Charter Commc'n*, 345 F. Supp. 3d 1064, 1068 (W.D. Wisc. 2018); *Reyes v. BCA Financial Services, Inc.*, 312 F. Supp. 3d 1308, 1320 (S.D. Fla. 2018); *Abante Rooter & Plumbing, Inc. v. Alarm.com Inc.*, No. 15-CV-06314-YGR, 2018 WL 3707283, at *6 (N.D. Cal. Aug. 3, 2018); *Maddox v. CBE Grp., Inc.*, No. 17-cv-1909, 2018 WL 2327037 (N.D. Ga. May 22, 2018); *Swaney v. Regions Bank*, No. 13-cv-544, 2018 WL 2316452, at *1 (N.D. Ala. May 22, 2018). Other courts have disagreed and held that earlier orders can be invalidated as a result of the *ACA International* decision. *See, e.g., Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018); *Sessions v. Barclays Bank Delaware*, 317 F. Supp. 3d. 1208, 1212 (N.D. Ga. 2018); *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 924, 935 (N.D. Ill. 2018); *Flemming v. Associated Credit Servs., Inc.*, 342 F. Supp. 3d 563 (D.N.J. 2018); *Gonzalez v. Ocwen Loan Servicing, LLC*, No. 5:18-cv-340, 2018 WL 4217065 (M.D. Fla. Oct. 30, 2018).

The autodialer definition is the key to the TCPA protections for cell phone customers. Congress delegated interpretive regulatory authority to the FCC to implement the statute, and even emphasized that the agency must exercise that authority "as necessary in the interest of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C). Congress also created in the Hobbs Act a channel for prompt judicial review of FCC orders, which enables uniform and certain application of the law. The Petitioners in this case are now asking the court to upend that entire system. Petitioners would replace the uniform system for implementing the TCPA based on the views of the

public, solicited through the transparent notice-and-comment process, with a chaotic and unpredictable system involving disparate interpretations adopted in hundreds of civil cases. This is not what Congress intended, is contrary to the purposes the APA and the Hobbs Act, and will diminish public participation in the decisions of federal agencies.

* * *

For the foregoing reasons, this Court should affirm the Fourth Circuit and make clear that prior FCC interpretations are binding unless they are modified by the agency or successfully challenged under the Hobbs Act.

CONCLUSION

For the foregoing reasons, EPIC respectfully ask this Court to affirm the decision of the U.S. Court of Appeals for the Fourth Circuit and remand the case.

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No. 17-1705

In The
Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF OKLAHOMA, INDIANA, LOUISIANA, NEBRASKA, TEXAS, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act.

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Bridgeview Health Care Ctr., Ltd. v. Clark, 816 F.3d 935 (7th Cir. 2016) 24

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CE Design, Ltd. v. Prism Bus. Media, Inc., 606 F.3d 443 (7th Cir. 2010) 10

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Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 9

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Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 25

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FCC v. Pacifica Found., 438 U.S. 726 (1978) 23

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Garco Constr., Inc. v. Speer, 138 S. Ct. 1052 (2018) 14

Gutierrez-Brizuela v. Lynch, 834 F.3d 1142 (10th Cir. 2016) 13

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Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) 19

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 25

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Marsh v. J. Alexander's LLC, 905 F.3d 610 (9th Cir. 2018) 14

Massachusetts v. EPA, 549 U.S. 497 (2007) 25

Michigan v. EPA, 135 S. Ct. 2699 (2015) 13

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Multistar Indus., Inc. v. U.S. Dep't of Transp., 707 F.3d 1045 (9th Cir. 2013) 9

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N.L.R.B. Union v. Fed. Labor Relations Auth., 834 F.3d 191 (D.C. Cir. 1987) 20, 26

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Neustar, Inc. v. FCC, 857 F.3d 886 (D.C. Cir. 2017) 10

Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. 2014) 4, 7

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S.E.R.L. v. Atty. Gen. U.S. of Am., 894 F.3d 535 (3d Cir. 2018) 14

Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc., 863 F.3d 460 (6th Cir. 2017) 10

Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc., 788 F.3d 218 (6th Cir. 2015) 4, 15

Scenic Am. Inc. v. U.S. Dep't of Transp., 138 S. Ct. 2 (2017) 14

Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87 (1995) 9

Sierra Club v. U.S. Nuclear Regulatory Comm'n, 862 F.2d 222 (9th Cir. 1988) 9

Simmons v. ICC, 716 F.2d 40 (D.C. Cir. 1983) 19

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 5, 18

Sprint Nextel Corp. v. FCC, 508 F.3d 1129 (D.C. Cir. 2007) 9

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 21

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Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue, 914 N.W.2d 21 (Wis. 2018) 14

Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364 (Va. 1939) 8

United States v. Any & All Radio Station Transmission Equip., 204 F.3d 658 (6th Cir. 2000) 21

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United States v. Nixon, 418 U.S. 683 (1974) 15

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Voices for Int'l Bus. & Educ., Inc. v. N.L.R.B., 905 F.3d 770 (5th Cir. 2018) 14

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§ 9613(a) 25

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OTHER AUTHORITIES

Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) 14

Attorney General's Manual on the Administrative Procedure Act (1947) 9

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) 13

Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805 (2018) 2

J. Gregory Sidak, *Does the Telephone Consumer Protection Act Violate Due Process As Applied?*, 68 FLA. L. REV. 1403 (2016) 23

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Jeffrey A. Pojanowski, *Without Deference*, 81 Mo. L. Rev. 1075 (2016) 14

Marshall Mathers, *Without Me*, The Eminem Show (2002) 23

Philip Hamburger, Is Administrative Law Unlawful? (2014) 14

Robert A. Katzmann, Judging Statutes (2014) 14

Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313 5

The Federalist No. 47 (J. Madison) 15, 16

Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union (1868) 12

Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 Neb. L. Rev. 70 (2011) 24

Regulations

Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005, 71 Fed. Reg. 25,967 (May 3, 2006) 5

INTERESTS OF AMICI CURIAE

Amici curiae are the States of Oklahoma, Indiana, Louisiana, Nebraska, Texas, and West Virginia. Amici have a sovereign interest in preserving the separation of powers and the constitutional rights of their citizens, both of which are implicated by this case. Amici States have an especial interest in this case because the decision below, if affirmed, would deprive State courts of their independent and coordinate ability to interpret federal law in private suits brought under the Telephone Consumer Protection Act ("TCPA"). *See Johnson v. Williams*, 133 S. Ct. 1088, 1098 (2013). The Act specifically permits private litigants to bring suit under the TCPA in state courts, 47 U.S.C. §§ 227(b)(3) & 227(c)(5), which "have concurrent jurisdiction over private suits under the TCPA." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). "[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation." *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring). *A fortiori*, a state court cannot be bound by a federal agency's interpretation of a federal statute—especially where the federal statute is unambiguous and the agency's interpretation is unreasonable. The decision below threatens to upend that important prerogative of state courts. For similar reasons, the decision below also affects enforcement actions brought by State Attorneys General as authorized by the TCPA. 47 U.S.C. §§ 227(e)(6), 227(g).

Finally, the States' interests also extend to the many other contexts to which the Hobbs Act applies. By its own terms, the Hobbs Act's jurisdiction-channeling provision also applies to final orders issued by the Atomic Energy Commission, Department of Agriculture, Federal Maritime Commission, Department of Transportation, and Surface Transportation Board—as well as final orders under Section 812 of the Fair Housing Act, 42 U.S.C. § 3604, which prohibits discrimination in the sale or rental of housing. *See* 28 U.S.C. § 2342(2)-(7). Amici States have a role to play in all of these regulatory contexts, *see, e.g.*, 42 U.S.C. § 3604(5), and often find themselves disagreeing with federal agencies. The States are also frequently involved in litigation conducted pursuant to analogous provisions that preclude judicial review of agency action, such as the Clean Water Act. *See, e.g.*, 33 U.S.C. § 1369(b)(1); *Nat'l Ass'n. of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018); Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1810 (2018).

SUMMARY OF ARGUMENT

The Court below raised serious constitutional concerns relating to the separation of powers, due process, the First Amendment, and federalism when it held that the Hobbs Act, 28 U.S.C. §§ 2341 *et seq.*, required the district court to adopt the Federal Communication Commission's ("FCC") interpretation of the TCPA—regardless of its validity under the laws and Constitution of the United States. Pet. App. 18a. Although this Court has previously held that courts should defer to an agency's reasonable interpretation of an ambiguous statute, *Chevron U.S.A. Inc. v. Nat'l Res. Defense Council, Inc.*, 467 U.S. 837 (1984), this Court has never countenanced an argument that any Article III tribunal is statutorily *bound* by an agency's interpretation of a statute, *even if the interpretation is unambiguously unlawful.*

Yet that is what Respondent argues and what the court below held. In so doing, the Fourth Circuit has created a Hobson's choice: either monitor the Federal Register and challenge every guidance document within 60 days of promulgation, or forever waive any statutory or constitutional defense to private suits. *See* 28 U.S.C. § 2344 (providing 60 day requirement). The better reading of the Hobbs Act is that U.S. Courts of Appeals have exclusive jurisdiction over direct challenges to final orders that have the force of law, but defendants in private suits always retain the ability to raise constitutional or statutory defenses—even if they conflict with how federal agencies have interpreted the relevant statutes. Any other interpretation of the Hobbs Act would raise serious constitutional problems and so should be avoided.

ARGUMENT

I. The Hobbs Act Does Not Prevent State And Federal District Courts From Independently Interpreting Federal Statutes.

This case began like any other case an Article III tribunal hears. Plaintiff filed a private suit against defendants based on a federal cause of action under the TCPA. *See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016). The defendants argued that they did not violate the statute, because their conduct did not fall within the definition of "unsolicited advertisement" as used in the TCPA. 47 U.S.C. § 227(b)(1)(C). The Act itself defines the term, and so do many dictionaries. 47 U.S.C. § 227(a)(5) (defining phrase as "material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise"). It is hardly surprising, then, that in these cases Article III courts have conducted a straightforward interpretation of the statute: looking to the text of the statute, reviewing its definition, consulting various dictionaries, contemplating its ordinary meaning, as well as considering the FCC's own interpretation. *See, e.g.*, *Sandusky Wellness Ctr., LLC v. Medco Health Sols., Inc.*, 788 F.3d 218, 221 (6th Cir. 2015); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014); Pet. App. 24a-29a, 36a-43a. This is, after all, the bread and butter of the judicial process. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("[I]nterpreting congressional legislation is a

recurring and accepted task for the federal courts."). It is what courts do.

It is true that the FCC has also weighed in on the proper interpretation of this statutory phrase—as have several scholars. *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,973 (May 3, 2006); *see, e.g.*, Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. ILL. J.L. TECH. & POL'Y 313, 328-330. But this Court held that the judiciary is not bound by these interpretations, *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944), and need only defer to the agency when (1) the statute is ambiguous and (2) the agency's interpretation is reasonable. *Chevron*, 467 U.S. at 844.

The court below instead relied upon an idiosyncratic interpretation of the Hobbs Act to divest the district court of its ability to exercise its own judgment in interpreting a federal statute—or to even apply the already-too-deferential *Chevron* standard to the FCC's proffered interpretation. But by its own terms, the text of the Hobbs Act does not divest federal district courts of their constitutional obligation to independently interpret federal statutes for three reasons: (A) the Hobbs Act only applies to direct review of agency final orders; (B) in this case, the FCC's interpretive rule does not have the "force of law" and so is not reviewable; and (C) the lower court's interpretation would produce inefficient results at odds with the statute's purpose.

A. The Hobbs Act Only Applies To Direct Challenges, Because Only Direct Challenges "Determine The Validity Of" Agency Rules.

The Hobbs Act vests the federal courts of appeals with "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain orders. 28 U.S.C. § 2342. As this Court has previously recognized, this requires an aggrieved party to "bring a direct review proceeding to challenge" one of the specified final orders in a U.S. Court of Appeals. *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 613 (1966). After all, the plaintiff in such a suit would be asking the federal court "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" that final order, and the defendant in that suit would be the one and only party responsible for "the entry of [the] final order reviewable under this chapter"—that is, "[t]he action shall be against the United States." 28 U.S.C. § 2344. No one questions that, for example, if a litigant wishes to challenge "the FCC's denial of [its] rulemaking petition," such a suit may only be brought "in the Court of Appeals." *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)); *see also Council Tree Inv'rs, Inc. v. FCC*, 863 F.3d 237, 240 (3d Cir. 2017) (challenging FCC rule substance under arbitrary and capricious review).

But the Hobbs Act does not preclude a district court from interpreting a federal statute in a private action, even if the FCC has issued guidance on its interpretation of that statute. In a private suit, neither

the plaintiff nor the defendant is asking the district court to "determine the validity of" an interpretive rule. Rather, both parties may stipulate that the agency validly took an action expressing its interpretation of a statute—*e.g.*, that the FCC (or other agency) duly complied with all the procedural requirements when promulgating this view. The parties simply disagree with the agency's interpretation of the federal statute as expressed in the document. But no one is asking the court to order "the United States," 28 U.S.C. § 2344, to obey an injunctive directive, 28 U.S.C. § 2342.

This case was not a proceeding to enjoin, set aside, annul, or suspend any order. It is rather a civil suit, brought by a private entity (Carlton & Harris Chiropractic) against another private entity (PDR Network) under a particular statute, the parties disagree about whether the statute applies to the defendant's actions, and the FCC happens to have proffered an interpretation of that statute. It is therefore better characterized as a proceeding to impose civil liability on a regulated entity, consistent with the agency's interpretation of a federal statute. But as Judge Thacker noted in her dissent, "the district court did not actually determine the validity of the 2006 FCC Rule" and so "did not exceed its jurisdiction." Pet. App. 19a.

Indeed, other federal judges have reached the same conclusion. As the Third Circuit recently held, a private suit under the TCPA "does not address the validity of the FCC's orders" and so is outside the Hobbs Act. *Manuel v. NRA Group LLC*, 722 Fed. App'x 141, 144 n.5 (3d Cir. 2018); *cf. Osorio*, 746 F.3d at 1257

("[W]e are not called upon here to assess the order's validity. We are instead simply deciding whether the FCC's . . . ruling is applicable to the present case."). But it is emphatically wrong to say that, "[b]y refusing to enforce the FCC's interpretation, the district court exceeded its power." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014).

This conclusion is consistent with the daily practice of state courts across the country that assume the validity of other states' legal determinations, yet nevertheless adjudicate whether those determinations provide a basis for the relief requested by private parties. U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); *see, e.g.*, *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364, 368 (Va. 1939); *cf. Calderon v. Ashmus*, 523 U.S. 740, 746 (1985) (assuming validity of insurance policy).

B. The Hobbs Act Does Not Apply To Interpretive Rules Because They Do Not Have The Force Of Law.

The Hobbs Act applies to "all final orders of the [FCC] made reviewable by 47 U.S.C. § 402(a)." 28 U.S.C. § 2342(1). Section 402(a), in turn, makes reviewable "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." But to be reviewable, and thus subject to the Hobbs Act, the FCC's determination must have the "force of law." *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407,

417 (1942). "Generally, administrative orders are final and appealable if they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Multistar Indus., Inc. v. U.S. Dep't of Transp.*, 707 F.3d 1045, 1052 (9th Cir. 2013) (quoting *Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 862 F.2d 222, 225 (9th Cir. 1988)); *see, e.g.*, *Houston Post Co. v. United States*, 79 F. Supp. 199, 202 (S.D. Tex. 1948) (conducting inquiry into "whether the complained of interpretation of the [FCC] is or is intended to be a mere expression of opinion").

In this case, the FCC's interpretive rule is merely a guidance document. "Interpretive rules do not require notice and comment" and "do not have the force and effect of law." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995). As such, they "are not accorded that weight in the adjudicatory process." *Id.* Instead, the interpretive rules are merely "issued by [the] agency to advise the public of the agency's construction of the statutes and rules which it administers." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30, n.3 (1947)); *see also Perez v. Morg. Bankers Assoc.*, 135 S. Ct. 1199, 1203-04 (2015). Although this may be of some use to courts in ascertaining the meaning of ambiguous statutes, this rule does not rise to the level of having the "force of law" and so falls outside the ambit of the Hobbs Act. *See, e.g.*, *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 143-44 (1939); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131 (D.C. Cir. 2007). The district court in this case therefore

had jurisdiction to interpret the TCPA in the first instance.

C. Any Other Interpretation Produces Inefficient Results, At Odds With The Purpose Of The Hobbs Act.

Everyone agrees that the purpose of the Hobbs Act is to promote efficiency. The provision at issue "'promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency' with overseeing the TCPA." Pet. App. 7a-8a (quoting *Mais*, 768 F.3d at 1119); *accord Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010); *cf. Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 633 (noting efficiency of eliminating district court review). Rather than encouraging litigants to undertake costly review in a district court before an inevitable appeal to a U.S. Court of Appeals, Congress recognized that it would be more efficient to let these pure questions of law be brought in the appellate courts in the first instance. This all remains true if application of the Hobbs Act's preclusive review provision remains limited to direct challenges of legally binding rules. *See FCC v. ITT World Commc'ns, Inc.*, 466 U.S. at 468; *Neustar, Inc. v. FCC*, 857 F.3d 886, 891 (D.C. Cir. 2017).

But the same logic does not extend to suits brought by private parties to enforce the TCPA against other private parties. Under the Fourth Circuit's reading, private businesses should monitor the Federal Register for every new interpretive rule, challenge such rules at the time they are being considered (so as to have standing for a subsequent challenge in federal court), then challenge them in a U.S. Court of Appeals within 60 days—or forever waive any legal defense in a subsequent private action. This would require firms to undertake significant compliance operations. It would force businesses to guess well in advance whether a new rule could ever be applied to their future conduct. All of this would produce massive inefficiencies at odds with the purpose of the Hobbs Act. And as Justice Powell points out, it "is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring).

For all these reasons, this Court should not read the Hobbs Act as abrogating the power of district courts to entertain constitutional and statutory defenses in private suits brought under the TCPA.

II. Constitutional Avoidance Counsels Against Respondent's Preferred Reading Of The Hobbs Act.

The court below held that "The Hobbs Act requires a district court to follow FCC interpretations of the TCPA." Pet. App. 18a. This holding raises serious constitutional concerns: (A) it violates the separation of powers and undermines federalism by depriving federal district courts and state courts of their obligation to "say what the law is"; (B) it violates due process by depriving regulated entities of any meaningful opportunity to contest an agency's interpretation of law; and (C) it leads to absurd consequences where regulated entities may be foreclosed from raising constitutional defenses to private actions.

But this Court has consistently held that "[w]hen a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem." *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 74 (1868) ("A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it.").

Here, the statute is susceptible to an interpretation that does not raise any constitutional issues. *Supra* Part I.

A. Reading the Hobbs Act As A Jurisdiction-Stripping Statute Would Violate Separation Of Powers And Undermine Federalism.

At this point, the serious constitutional problems raised by rules that require courts to abdicate their role of independently interpreting the law are well-recognized. They have been pointed out by members of this Court.[1] Judges of lower courts have repeatedly

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[1] *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring) ("The type of reflexive deference exhibited in some of these cases is troubling. . . . [I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("I write separately to note that [the agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."); *Perez*, 135 S. Ct. at 1213 (Thomas, J., concurring) ("I write separately because these cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations . . . [b]ecause th[ese] doctrine[s] . . . rais[e] constitutional concerns."); *Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge."); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129

complained of them.[2] "Scholarly voices have joined the skeptical chorus as well." Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1079 (2016).[3] Nonetheless, this Court has postponed the question of "whether *Chevron* should remain" good law. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

But if *Chevron* deference is bad, *PDR* deference is worse. Here, the court below held that "The Hobbs Act

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HARV. L. REV. 2118, 2150-54 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (discussing practical difficulty of ascertaining when a statute is "ambiguous"); *see also E.I. Du Pont De Nemours & Co. v. Smiley*, 138 S. Ct. 2563 (2018) (statement of Gorsuch, J., respecting the denial of certiorari); *Garco Constr., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., dissenting from denial of certiorari); *Scenic Am. Inc. v. U.S. Dep't of Transp.*, 138 S. Ct. 2 (2017) (statement of Gorsuch, J., respecting the denial of certiorari).

[2] *See, e.g.*, *Arangure v. Whitaker*, No. 18-3076, 2018 WL 6614239, at *2 (6th Cir. Dec. 18, 2018); *S.E.R.L. v. Atty. Gen. U.S. of Am.*, 894 F.3d 535, 554 (3d Cir. 2018); *Voices for Int'l Bus. & Educ., Inc. v. N.L.R.B.*, 905 F.3d 770, 780 (5th Cir. 2018); *Chamber of Com. of U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360, 380 n.14 (5th Cir. 2018); *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 637 (9th Cir. 2018) (Ikuta, J., dissenting); *Our Country Home Enters., Inc. v. Comm'r of Internal Revenue*, 855 F.3d 773, 790 (7th Cir. 2017); *Egan v. Delaware River Port Auth.*, 851 F.3d 263, 280 (3d Cir. 2017) (Jordan, J., concurring); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-32 (6th Cir. 2016), *rev'd on other grounds*, 137 S. Ct. 1562 (2017) (Sutton, J., concurring in part and dissenting in part); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 48 (Wis. 2018).

[3] *See, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing "yes"); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 1000 (2017) (concluding that *Chevron* "is an innovation" that "cannot be squared with the text of section 706 of the APA").

requires a district court to follow FCC interpretations of the TCPA," Pet. App. 18a, *even if the statute is not ambiguous*, and *even if the agency's interpretation is unreasonable*. Such a rule would combine the legislative, executive, and judicial powers in one set of hands—"the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (J. Madison). It would represent the *ne plus ultra* of judicial deference to the administrative state. Even in the context of national security, this Court has "reaffirm[ed] that it is the province and duty of this Court 'to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 705 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). "Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). And in this particular case, both the district court and other courts have found the statute to be "unambiguous" and contrary to the FCC's preferred interpretation. Pet. App. 39a, 42a; *Sandusky*, 788 F.3d at 223. Nor is this an isolated occurrence; the FCC's interpretations are frequently "difficult to follow." *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 (D.C. Cir. 2017) (Kavanaugh, J.). The decision below therefore threatens to undermine the separation of powers.

The most natural reading of this statute is that Congress intended to command litigants bringing *direct* challenges to new FCC rules to file them in the U.S. Courts of Appeals—for the sake of judicial economy. Nothing in the text, history, or purpose of the

statute indicates that Congress intended to deprive Article III tribunals from interpreting laws before applying them to particular cases. As this Court spelled out in *Marbury v. Madison*, "Those who apply the rule to particular cases, *must of necessity expound and interpret that rule*." 5 U.S. (1 Cranch) at 178 (emphasis added). "When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against." *Perez*, 135 S. Ct. at 1221 (Thomas, J., concurring) (citing THE FEDERALIST NO. 47 (J. Madison)).

But this case implicates more than just the horizontal separation of powers within the national government. Under the TCPA, enforcement actions may also be brought in *state* courts, 47 U.S.C. §§ 227(b)(3) & 227(c)(5), which "have concurrent jurisdiction over private suits under the TCPA." *Mims*, 565 U.S. at 372. The TCPA also authorizes enforcement actions by State Attorneys General. 47 U.S.C. §§ 227(e)(6), 227(g). If both state courts and state officials must enforce the law as interpreted by a federal agency—no matter how unlawful that interpretation is—serious federalism concerns arise. At a minimum, it forces state courts and officials either to be commandeered into applying the TCPA in a potentially unlawful or unconstitutional manner, or to get out of the business of enforcing the TCPA at all.

The court below also erred in holding that "Congress has specifically stripped jurisdiction from the

district courts regarding a certain issue, those courts lack the power and authority to reach it." Pet. App. 8a. As this Court's decisions have noted, jurisdiction-stripping statutes raise serious separation of powers concerns. *Patchak v. Zinke*, 138 S. Ct. 897 (2018); *id.* at 914 (Roberts, C.J., dissenting); *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1323 n.17 (2016); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *cf. Williams v. Taylor*, 529 U.S. 362, 379 (2000) (stating that "[a] construction of [a statute] that would require the federal courts to cede [interpretive] authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution").

To be sure, this Court has held that Congress may amend the law during the pendency of appeals, provided it does not direct courts to enter judgment in favor of one party or another. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992). And Congress may confer or strip a court of jurisdiction over a certain claim—as a whole. But Congress may not both grant jurisdiction to courts (*e.g.*, over private suits for telecommunication violations) and at the same time prohibit courts from entertaining statutory and constitutional defenses to these suits. In other words, Congress cannot grant a court jurisdiction to hear a statutory claim, but then force the same court to blind itself to what the statute actually says and instead look only to an agency's interpretation in enforcing the statute. Inherent in the guarantee of due process is the right to have a federal court interpret and apply a federal statute

before one private party can impose civil liability on another. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995). Just as everyone agrees that "Congress could not enact a statute directing that, in 'Smith v. Jones,' 'Smith wins'" because "[s]uch a statute would . . . direct the court how pre-existing law applies to particular circumstances," *Bank Markazi*, 136 S. Ct. at 1323 n.17, neither may Congress direct district courts to apply pre-existing law (here, the TCPA) to particularized circumstances as decided by a federal agency (FCC). This short-circuits the judicial process of determining in the first instance how to apply the pre-existing law to these facts. That is why this Court has always maintained that an agency's views "do not constitute an interpretation of [an a]ct or a standard for judging factual situations *which binds a district court's processes*, as an authoritative pronouncement of a higher court might do." *Skidmore*, 323 U.S. at 139. The Hobbs Act, under Respondent's view, therefore raises novel constitutional questions about the extent to which Congress may enact issue-stripping legislation.

B. The Decision Below Would Deprive Defendants Of Due Process.

This Court has previously warned of "[t]he severity" of any scheme where "persons subject to the Act, including innumerable small businesses" must "protect themselves against arbitrary administrative action only by daily perusal of . . . the Federal Register and by immediate initiation of litigation . . . to protect their interests." *Adamo Wrecking Co.*, 434 U.S. at 283

n.2. It is therefore of no moment to suggest that businesses like PDR could have or should have brought a direct challenge against the FCC's 2006 rule at the time it was promulgated. For one thing, PDR and similar businesses would likely have lacked standing. Pet. Br. 25; *see Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). For another, it would be exorbitantly expensive to monitor the Federal Register, file direct challenges to every new rule, and guess what future business ventures the company might pursue years or even decades down the line—and then file suit within 60 days of the interpretive rule. 28 U.S.C. § 2344. *Cf.* Pet. Br. 40 (characterizing rule as a "severe form of issue preclusion"). What is more, some businesses might not even have existed at the time of the disputed rule, making it legally impossible for them to have ever filed a challenge in time. Such an interpretation would "place in the hands of the" FCC the "unreviewable discretion" to interpret federal law in a manner that would "stri[p] the [defendant] of his constitutional rights and protections." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 244 (1960). "This phenomenon raises the spectre of possible unfairness, particularly to small manufacturers who may lack resources to monitor the Administrator's actions to assure protection of the opportunity to contest regulations affecting their interests." *Chrysler Corp. v. EPA*, 600 F.2d 904, 912-13 (D.C. Cir. 1979).

C. The Decision Below Would Strip Defendants Of The Ability To Raise Constitutional And Statutory Defenses.

The absurdity of Respondent's view is best illustrated by considering a corner case. Imagine that a federal agency passes an interpretive rule that on its face discriminates on the basis of race in violation of the Fourteenth Amendment or chills speech in violation of the First Amendment. Imagine further that no regulated entity challenges this interpretive statute in court at the time it is promulgated. *N.L.R.B. Union v. Fed. Labor Relations Auth.*, 834 F.3d 191, 169 (D.C. Cir. 1987) (suggesting similar hypothetical). Does this mean that any defendant sued on the basis of violating the law has forfeited his right to raise a constitutional defense? We think not.

As Justice Powell explained in *Adamo Wrecking Co.*, a regulated entity that fails to challenge an administrative rule within the specified timeframe should not be deprived of later raising a constitutional defense to its application without a court giving the constitutional question "serious consideration." 434 U.S. at 290 (Powell, J., concurring); *see also Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring) (repeating this concern); *cf. Elgin v. Dep't of Treasury*, 567 U.S. 1, 24 (2012) (Alito, J., dissenting) (raising similar concerns). This follows from the basic rule that "[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws . . . may afford him." *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874). "The

supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

Perhaps mindful of these concerns, at least one federal court of appeals has explicitly recognized that these Constitutional concerns warrant a narrow reading of the Hobbs Act. In *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000), the government initiated an in rem forfeiture action against an unlicensed micro-broadcaster in an attempt to seize equipment knowingly used to broadcast without a license. The defendant argued that the FCC regulation relied upon "was an unconstitutional prior restraint on speech" in violation of the First Amendment. *Any & All*, 204 F.3d at 662, 666-67. The district court held "that it lacked jurisdiction to entertain [the defendant]'s constitutional defenses because 28 U.S.C. § 2342 [*i.e.*, the Hobbs Act] provides that courts of appeals have exclusive jurisdiction 'to enjoin, set aside, suspend . . . or to determine the validity of . . . all final orders of the [FCC].'" *Any & All*, 204 F.3d at 667. The Sixth Circuit reversed, "for the simple reason that no FCC order is being challenged." *Id.* (quoting *United States v. Any & All Radio Station Transmission Equip.*, 169 F.3d 548, 554 (8th Cir. 1999), *opinion rev'd on reh'g*, 207 F.3d 458 (8th Cir. 2000) (Arnold, J., concurring)).

In the words of Judge Arnold, "Until today I had not supposed that anyone could plausibly maintain

that any court of the United States, properly seized of jurisdiction of a suit, did not also have jurisdiction to consider constitutional defenses to that suit." *Any & All*, 169 F.3d at 554 (Arnold, J., concurring), *opinion rev'd on reh'g*, 207 F.3d 458 (8th Cir. 2000). Although the Hobbs Act might govern the jurisdiction for filing "a suit to enjoin a denial of a rulemaking petition[, n]o such petition is at issue here, and the fact that [a defendant] could file one and have his defenses adjudicated is of no moment." *Id.*

But not all lower courts have recognized this principle. *Compare United States v. Neset*, 235 F.3d 415 (8th Cir. 2000) (rejecting argument), *with id.* at 421 (Heaney, J., dissenting) ("I agree with the Sixth circuit's decision . . . that the district courts in this type of case have jurisdiction to hear First Amendment challenges to the F[CC]'s prohibition of microbroadcasting in the context of an enforcement action filed against them."). It is therefore vital that this Court make clear that regulated entities do not forever lose their statutory or constitutional rights by failing to object to agency rules.

This basic constitutional concern is magnified here in the context of the FCC, which regulates speech. Historically, this Court has vigilantly guarded the First Amendment by permitting facial challenges and lenient standing requirements in order to counteract the specter of speech being chilled. *Virginia v. Hicks*, 539 U.S. 113, 118 (2003) ("The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges."). Yet

here, the court below went out of its way to deprive the district court of any ability to second-guess the FCC's own interpretation of the TCPA. Pet. App. 2a. This is especially troubling in the context of telecommunications law, as the FCC is uniquely positioned to clamp down on disfavored speech in violation of the First Amendment. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).[4] The speech at issue in this case is hardly "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). To the contrary, Petitioners are offering free copies of a medical text—*Physicians' Desk Reference*—a document of significant social value. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 478 (2013) (relying upon text).

What is more, federal judges have singled out the TCPA in particular for its "draconian penalties," *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011) (Posner, J.), which are so disproportionate that scholars have warned lower courts to "take seriously the possibility that the TCPA's statutory damages violate the Due Process Clause of the Fifth Amendment as applied." J. Gregory

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[4] As "the well-known performer Eminem," *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015), once complained:

> *So the FCC won't let me be,*
> *Or let me be me, so let me see.*
> *They try to shut me down on MTV,*
> *But it feels so empty without me.*

Marshall Mathers, *Without Me*, THE EMINEM SHOW (2002).

Sidak, *Does the Telephone Consumer Protection Act Violate Due Process As Applied?*, 68 FLA. L. REV. 1403, 1412 (2016); *cf. Adamo Wrecking Co.*, 434 U.S. at 283 (emphasizing "[t]he stringency of the penalty imposed"). Private entities have in turn leveraged overbroad agency interpretations to bring *in terrorem* suits against small businesses in their hunt for large settlements. In the words of one court of appeals, "junk-fax litigation is best explained" as having "'blossom[med] into a national cow for plaintiff's attorneys specializing in TCPA disputes'" who use it as a "means of targeting small businesses" to "nai[l] the little guy, while . . . tak[ing] a big cut." *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (quoting Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 97 (2011)).

This Court would never countenance the notion that courts should defer to administrative agencies when interpreting the First or Fourteenth Amendments. It is therefore vital that this Court preserve defendants' ability to raise constitutional and statutory defenses, lest the FCC propagate rules with "obvious chilling effect on free speech." *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 872 (1997); *see, e.g.*, *Am. Lib. Assoc. v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) ("The FCC argues that the Commission has 'discretion' to exercise 'broad authority' over equipment used in connection with radio and wire transmissions, 'when the need arises, even if it has not previously regulated in a

particular area.' This is an extraordinary proposition.") (quoting FCC brief). As this Court recently made clear in the context of the TCPA, "[f]ederal courts, though 'courts of limited jurisdiction,' in the main 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Mims*, 565 U.S. at 376 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

Nor are these concerns limited to the FCC, as the Hobbs Act equally extends to final orders issued by the Atomic Energy Commission, Department of Agriculture, Federal Maritime Commission, Department of Transportation, and Surface Transportation Board—as well as final orders under Section 812 of the Fair Housing Act. *See* 28 U.S.C. § 2342(2)-(7). And other federal statutes contain similar jurisdiction-channeling provisions, including the Clean Air Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 33 U.S.C. § 1369(b); 42 U.S.C. §§ 7607(b)(2), 9613(a). Amici States frequently litigate claims under these statutes. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 514 (2007); *see also Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 627 (discussing States' challenges to the EPA's Waters of the United States rule). And in those contexts, this Court has consistently held that jurisdiction-channeling provisions do not foreclose all other forms of judicial review.

For example, in *Decker v. N.W. Envtl. Defense Ctr.*, 568 U.S. 597 (2013), this Court held that 33 U.S.C.

§ 1369(b)'s "exclusive jurisdiction mandate . . . extends only to certain suits challenging some agency actions" but "does not bar a district court from entertaining a citizen suit . . . against an alleged violator . . . seek[ing] to enforce an obligation imposed by the Act or its regulations." *Id.* at 608; *cf. N.L.R.B. Union*, 834 F.3d at 196 (noting that because "administrative rules and regulations are capable of continuing application[,] limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule of an opportunity to question its validity") (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)).

Most notably, in *Adamo Wrecking Co.*, this Court held that a defendant "who is charged with a criminal violation under the [Clean Air Act] may defend on the ground that" its conduct did not fall within the statute, even though the agency's implementing regulation was reviewable exclusively in the U.S. Courts of Appeals. 434 U.S. at 279. The Court explained that Congress "ha[d] not uniformly precluded judicial challenge to the order as a defense in [a] criminal proceeding." *Id.* at 282.

> The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar

> inquiries which arise in the course of an administrative review proceeding. The question is only whether [the defendant's conduct falls] within the broad limits of the congressional meaning of that [statute].

Id. at 285.

The Court emphasized that "the Administrator's promulgation of the standard is not subject to judicial review in the criminal proceeding," and "[t]he District Court did not presume to judge the wisdom of the regulation or to consider the adequacy of the procedures which led to its promulgation." *Id.* at 283-84. Instead, the district court "merely concluded that" the alleged conduct did not fall within the statutory definition. *Id.* at 284. As a result, the Clean Air Act's exclusive review provisions "d[id] not relieve the Government of the duty of proving, in a prosecution" that the conduct falls within the relevant statutory definition. *Id.* For the same reasons, the Hobbs Act does not relieve Respondent of its burden to show that Petitioners' conduct falls within the language of the TCPA.

* * *

For all these reasons, Respondent's interpretation of the Hobbs Act raises serious constitutional concerns and should be rejected. The decision below threatens to permit the administrative state to swallow up even more of the liberties guaranteed by the separation of powers, federalism, and due process. Although "the time has" not yet "come to face the behemoth" of judicial deference to federal agencies, *Lynch*, 810 F.3d at

1149 (Gorsuch, J., concurring), at the very least we should stop feeding it.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *ET AL.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici, state and local government associations, respectfully submit this *amici curiae* brief in support of Petitioners.[1]

Amici have a strong interest in informing the Court of the significant, adverse, and unwarranted consequences that the Nation's state and local governments suffer as a result of affording blind deference to federal agencies' interpretations of congressionally enacted statutes. According complete deference requires the judiciary to abdicate its constitutional duties and creates serious separation of power problems. That blind deference detrimentally affects state and local governments by disrupting state and local legal regimes and imposing a significant strain on limited state and municipal resources.

Maintaining the status quo and preserving district courts' ability to perform the standard *Chevron* analysis will help avoid more serious constitutional questions and ensure that state and local governments retain the ability to defend themselves from questionable agency interpretations. This, in turn, will minimize disruption to state and local regimes, and avoid—or at least limit—the risk to federalism posed by federal agencies' ever-expanding authority.

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[*] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[1] A full list of the signatories to this brief and more detailed information about individual *amici* is provided in the Appendix.

SUMMARY OF ARGUMENT

Within the scope of its application, the Hobbs Act, as construed by the court of appeals, does not simply defer to agency constructions of ambiguous statutes, as is the practice under *Chevron, U.S.A.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Instead, it applies an even more deferential approach under which district courts may not even consider unambiguous statutory language if the agency has spoken to the issue before the court. Even where, as here, the district court concluded that the statute unambiguously required that Petitioners prevail, the ruling of the court of appeals dictates that the district court lacks the power to apply that unambiguous statute.

This approach is contrary to the language and intent of the Hobbs Act and would raise serious separation-of-powers and due process questions. Congress directed only that the courts of appeals would have exclusive jurisdiction to "enjoin, set aside, suspend * * * or determine the validity of" an agency action, not that a district court could not even apply a statute directly to the facts before it without first applying the agency's order. Congress's regulation, through the Hobbs Act, of direct challenges to the adoption of an agency final order was not intended to, and did not, prevent district courts from deciding the validity of any statutory claim that even touches on an agency order. The construction of the Hobbs Act by the court of appeals would work an unprecedented transfer of judicial and legislative power to agencies, which would be free to construe federal law without any opportunity for judicial review.

The approach of the court of appeals would cause serious harm to state and local governments. It would require those governments to anticipate and challenge possible future unlawful applications of an agency order when they were still theoretical or lose the chance to do so forever. Nothing in the Hobbs Act requires this heavy burden to be placed on state and local governments. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE HOBBS ACT DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION TO ADJUDICATE PETITIONERS' STATUTORY ARGUMENTS.

A. The Hobbs Act's Restrictions on District Court Actions Are Narrow.

1. As Petitioners recount (at 6–7), Congress passed the Administrative Orders Review Act (the Hobbs Act) in 1950 to channel certain challenges to agency action directly to the courts of appeals. The Hobbs Act confers on the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain actions performed by the covered agencies. 28 U.S.C. § 2342 *et seq.* These agencies include the Federal Communications Commission, the Atomic Energy Commission, the Federal Maritime Commission, and others. *Ibid.*

The plain language of the Hobbs Act thus reaches only direct challenges to the agency action itself: requests to enjoin it, set it aside, suspend it, or invalidate it. By channeling such direct challenges into

the courts of appeals, Congress intended the Hobbs Act to help administrative agencies act more efficiently. The House Report explained that "submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court on review, and thus going over the same ground twice." H.R. Rep. No. 2122, at 3–4 (1950). See also S. Rep. No. 2618, at 4–5 (1950) ("The proposed method of review has important advantages of simplicity and expedition * * * in the disposition of a considerable class of business of the Federal courts.").

Courts, by and large, have embraced that rationale. This Court has observed that "[o]ne purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court." See, *e.g.*, *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 740 (1985). Direct review in the courts of appeals has the "most obvious advantage" of saving time "compared to review by a district court, followed by a second review on appeal." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 593 (1980).

This efficiency rationale is consistent with Petitioners' construction of the Hobbs Act as reaching "just one kind of proceeding: suits against the United States brought to obtain injunctive or declaratory relief from agency action." Petr. Br. at 2. In "proceedings for *direct* review, in which a party seeks injunctive or declaratory relief against the United States from an allegedly unlawful agency action," Petr. Br. at 13, the Hobbs Act promotes efficiency by channel-

ing requests for review of the agency's decision directly to the courts of appeals.

In contrast, where, as here, a private plaintiff asserts that defendants have violated a federal law as construed by an agency, the plaintiff's claim and the defendants' defense have not been litigated in front of the agency—or anywhere at all. To eliminate the defendants' ability to argue that the statute does not prohibit their conduct would not reflect efficient adjudication of a defense, but straightforward deprivation of the right to advance the defense at all.

It is thus no surprise that the overwhelming majority of early Hobbs Act cases focused on direct challenges to agency actions—precisely what the Act was written to address. See, *e.g.*, *Isbrandtsen Co.* v. *United States*, 211 F.2d 51 (D.C. Cir. 1954); *Consolo* v. *Fed. Mar. Comm'n*, 383 U.S. 607 (1966); *Nat. Res. Def. Council* v. *U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261 (D.C. Cir. 1979). In *Consolo*, for example, the appellant filed a "direct appeal from the Commission's reparation order granting only part of the relief requested." 383 U.S. at 613. These cases consistently involved an agency as party, not a private dispute to which an agency regulation was purportedly relevant.

2. Other provisions of the Hobbs Act are consistent with this view of the Act as a means to promptly and efficiently adjudicate direct challenges to agency action. The Act provides that challenges to certain agencies' actions must be brought within 60 days after the entry of a final order. 28 U.S.C. § 2344. That deadline is workable for direct challenges that seek to invalidate the order itself; indeed,

it is consistent with the deadline for a notice of appeal in cases that, like a direct challenge to an agency decision, involve the United States. Fed. R. App. P. 4(a). But a deadline following closely after the order is entered—long before the application of the order to potential future facts is made or necessarily even contemplated—is untenable where the order has not been applied to any particular facts at all. Once the 60-day deadline lapses, a potential challenger must petition the agency to promulgate a new order or rule. If the agency denies that petition, the challenger may subsequently seek review of that denial in the courts of appeals. See, *e.g.*, *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 465–66 (1984).

The D.C. Circuit has commented that "[t]his time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations." *Nat. Res. Def. Council* v. *Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). But the courts cannot—and it would not be efficient to—finally adjudicate every possible application of an agency order to future, unknown facts to determine whether the agency order could ever be (or become) inconsistent with the terms of the statute.

The construction of the Hobbs Act as one limited to direct challenges to agency action is further supported by the requirement that parties seeking review of agency action be "aggrieved by" the order and, therefore, have "be[en] parties to any proceedings before the agency preliminary to issuance of its order." See Petr. Br. at 15 (quoting 28 U.S.C. § 2344

and *Simmons* v. *ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983)). A party who seeks to enjoin the agency action itself may reasonably be expected to participate in proceedings before the agency relating to that order. But it promotes *inefficiency* to expect parties like Petitioners here, who do not challenge the agency action itself but disagree with a particular application of that action, to have participated in the agency's original action and then appealed that action to seek the court's resolution of a future, hypothetical construction that an opposing litigant could make of the agency order.

In short, the Hobbs Act, if read to reach attempts to obtain injunctive or declaratory relief against the United States from an agency order, properly serves the efficiency goals for which it was enacted. But if expanded beyond its plain language to include suits that do not merely seek injunctive or declaratory relief against the United States, the Hobbs Act would embroil the courts in hypothetical disputes by requiring parties to raise in the courts of appeals at the time the order was issued all hypothetical challenges to the way the agency order could be applied to particular facts.

B. The District Court's Construction of the Telephone Consumer Protection Act ("TCPA") Did Not Run Afoul of the Hobbs Act.

1. Consistent with the Hobbs Act, "[n]either party in this case has challenged the validity of the FCC's interpretation of the TCPA." *Carlton & Harris Chiropractic, Inc.* v. *PDR Network, LLC*, 2016 WL 5799301, at *3 (S.D. W. Va. Sept. 30, 2016). Nor did

any party ask the district court to "enjoin, set aside, [or] suspend" that interpretation. *Ibid.*

In this particular case, instead of seeking to *invalidate* the 2006 Order,[2] both parties argued that the Order *supported* their position. See *Carlton & Harris*, 2016 WL 5799301, at *4 ("[E]ven if the Court were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision."). Far from invalidating the 2006 Order, the district court concluded that it "support[ed]" his decision—yet the court of appeals found that he lacked jurisdiction to apply the statute. See *Carlton & Harris Chiropractic, Inc.* v. *PDR Network, LLC*, 883 F.3d 459, 464 (4th Cir. 2018).

While the district court's affirmative conclusion that the agency order *supported* his decision highlights the error in concluding that he impermissibly *invalidated* that order, the case does not turn on that point. The key aspect of the analysis is that the content of the Order was not necessary to the outcome of the case in the district court. The issue of Petitioners' liability instead turns on the meaning of the *statute*. Thus, the district court properly determined that the issue could be decided on the basis of the statute's text, without any consideration of the ap-

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[2] The "2006 Order" is described in more detail in Petitioners' Brief at 5. The portion of the order that the Fourth Circuit deemed controlling provides that "unsolicited facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." See *Report and Order and Third Order on Reconsideration: Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3184 (2006).

plicability of the Order. Whether the Order is valid or invalid, applicable or inapplicable, was not a necessary question for the district court to resolve to ascertain whether Petitioners violated the TCPA.

2. The contrary conclusion of the court of appeals turns the usual *Chevron* approach to determining how much weight to give an agency pronouncement on its head. Under *Chevron*, whether Congress "has directly spoken to the precise question at issue" in its statute is the threshold question. *Chevron*, 467 U.S. at 842. If "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Because a finding that the statute is unambiguous ends the matter, a court that, like the district court here, finds the statute unambiguous makes no statement about the agency action *at all*. That is, the conclusion that the TCPA unambiguously does not apply to Petitioners' fax means that the TCPA claim fails. That holding does not require adjudicating whether the 2006 Order would lead to the same result or, if not, whether that makes the Order invalid in whole or in part.

As a result, a district court's analysis, after construction of an unambiguous statute, of whether the agency action would lead to the same result is unnecessary and, if included, unbinding *dicta*. It does not in any way affect the validity of the agency action in future cases.

The analysis of the court of appeals flips the *Chevron* approach. Rather than limiting consideration of agency action to circumstances in which the

statute is ambiguous, the court of appeals effectively prohibits consideration of the *statute* as law independent of the agency's construction of it. The court of appeals reasoned that the district court was "precluded * * * from even reaching the [*Chevron*] step-one question." *Carlton & Harris*, 883 F.3d at 464. Instead of reaching the question that this Court has held comes *first*, the court of appeals held that the district court must consider whether *the agency* has spoken to the issue in the case. If it has, then, in effect the court of appeals decision means that the application of the agency order "is the end of the matter" (see *Chevron*, 467 U.S. at 842), because the district court may not, under the view of the court of appeals, decline to follow the agency's construction. It is only, presumably, if the agency "has not directly addressed the precise question at issue" (*id.* at 843) that the court of appeals would permit a district court to consult the statutory command at all.

This Court has never construed the Hobbs Act to work such a sweeping change, nor should it here. As then-Justice Rehnquist remarked in a case raising similar issues, "I think it is difficult to believe that Congress would adopt a massive shift in jurisdiction from the district courts to the courts of appeals without any comment whatsoever." *PPG Indus.*, 446 U.S. at 600 (Rehnquist, J., dissenting). Here, the posited shift is even more massive; the court of appeals posits that Congress has shifted district court jurisdiction to construe statutes *entirely* to the agency. TCPA provides no hint Congress intended such a perverse result.

3. The court of appeals based its conclusion that the Hobbs Act prevented the district court from con-

struing the statute directly on its view that there was only a "'fine distinction'" between invalidating a rule and simply not applying it, and that both options are proscribed by the Hobbs Act. *Carlton & Harris*, 883 F.3d at 465. But the court ignored the key distinction that the Act *only prohibits* actions that "enjoin, set aside, suspend (in whole or in part), or * * * determine the validity of" the agency action. 28 U.S.C. § 2342. Nothing in the Hobbs Act purports to prohibit district courts from finding it unnecessary to consult a rule to decide the case.

Moreover, there is a *vast* distinction between invalidating the action of a federal agency and simply not opining on it. Had the district court ended its opinion with the conclusion that "the single fax at issue here is not an 'advertisement' as defined by the TCPA," its ruling would have had no necessary effect on the 2006 Order. *Carlton & Harris*, 2016 WL 5799301, at *3. The district court's conclusion that it need not consult the 2006 Order in light of the clarity of the statute simply says nothing about whether the 2006 Order is valid, in this or any other case.

II. Constitutional Avoidance Counsels Against Construing the Hobbs Act to Require Blind Deference.

Petitioners' construction of the Hobbs Act is also compelled by the canon of constitutional avoidance. Respondent's proposed prioritization of agency pronouncements over duly enacted law and the authoritative construction of the judiciary would do serious damage to fundamental separation-of-powers and due process principles.

1. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond* v. *United States*, 564 U.S. 211, 222 (2011). The Constitution confers on Congress the authority to *enact* the law (signed by the President) and on the judiciary the authority to *interpret* it. Under the Hobbs Act as construed by the court of appeals, the FCC had the authority to announce *whatever it wanted* as the meaning of the TCPA, and the judiciary is bound by that interpretation even if it is directly contrary to the statute adopted by Congress. That is, Congress may have *enacted* a statute, and an independent judiciary may, if given the opportunity, have *interpreted* it in Petitioners' favor. However, the court of appeals would give the agency the authority to force a different outcome than the statute—as enacted by Congress and interpreted by the court—actually mandates.

This transfer of power to the agencies is anomalous even in a field of ever-burgeoning agency power. The Senate Judiciary Committee has observed that "'[v]ery rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.'" *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting S. Rep. No. 752, at 26 (1945)). Thus, "[i]f a provision can reasonably be read to permit judicial review, it should be," *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part)—especially where one interpretation raises "'a serious doubt'" about an act of Congress. *Jennings* v. *Rodriguez*, 138

S. Ct. 830, 842 (2018) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)). See also *Benson*, 285 U.S. at 62 ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). And "[i]t is against this background that [the Court should] consider whether the authority of administrative agencies should be augmented even further, to include" the power to defeat judicial review without the judiciary engaging in any sort of review at all. *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, J., dissenting).

The elimination of judicial review in this context is particularly striking given that the court of appeals' construction of the Hobbs Act would allow Congress to hand off the legislative power while simultaneously restricting the judicial power. This would remove the possibility of any real check on the agencies covered by the Act—or any other agencies Congress may extend it to in the future. *Mistretta* v. *United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."). There can be no more serious affront to the principle of separation of powers than such blind submission. *City of Arlington*, 569 U.S. at 315 (Roberts, J., dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."); The Federalist No. 47 at 301 (J. Madison) (C. Rossiter ed., 1961) ("[A]ccumulation of all powers, legislative, executive, and judiciary, in the same hands, * * *

may justly be pronounced the very definition of tyranny."); Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, p. 152 (O. Piest ed., T. Nugent trans. 1949) ("There would be an end of everything were the same man, or the same body * * * to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.").

While *Chevron* is appropriately criticized for giving "core judicial and legislative powers" to unelected agencies,[3] the construction of the Hobbs Act advanced by the court of appeals goes much further. Step one of *Chevron* maintains the primacy of the *legislation*, at least where it is ambiguous. See *Michigan* v. *E.P.A.*, 135 S. Ct. 2699, 2707 (2015) (internal citations and quotation marks omitted) ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation."). Conversely, the Hobbs Act, as interpreted by the court of appeals, maintains

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[3] "*Chevron* * * * permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power * * * in a way that seems more than a little difficult to square with the Constitution." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). As has been noted ad nauseum in both legal literature and judicial opinions, *Chevron* raises important questions about the power of the modern executive. See, *e.g.*, *Michigan* v. *E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (explaining there are "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes"). It is nothing "less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

the primacy of the *agency action*, as set forth above. But see *Gutierrez-Brizuela*, 834 F.3d at 1150) (Gorsuch, J., concurring) ("[The] separation of functions aimed to ensure a neutral decisionmaker * * * faces more than a little pressure [when] * * * courts are required to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies.").

In our carefully crafted three-branch system, the Legislature may not abdicate its power to a subordinate of the second branch *and simultaneously* strip the third branch of its power as well. *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in judgment) ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."); *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Yet that is what the Hobbs Act, as construed by the court of appeals, purports to do. The Act can and should be read to avoid that construction, which at a minimum creates serious separation-of-powers concerns.

2. The court of appeals' construction of the Hobbs Act would also raise serious due process concerns. Petitioners' Br. 40–41. A party would have to anticipate at the time an agency action was taken whether that agency action could ever be applied in a way that brought it into conflict with the governing statute. Here, Petitioners contended the 2006 Order did not reach their conduct. In order to have meaningfully challenged that order, Petitioners would have had to anticipate that they would want to send

the faxes at issue, and that, in that circumstance, the 2006 Order would be misapplied to reach those faxes. But Petitioners could not challenge that application because they had no notice the 2006 Order would be applied in that way. And now that Petitioners do have such notice, the court of appeals would deny them any meaningful opportunity to defend themselves from the 2006 Order's application. To hold Petitioners liable for conduct that does not violate the statute, without providing any opportunity to prove it does not violate the statute, offends basic norms of due process.

III. Requiring District Courts to Defer Under the Hobbs Act Imposes Serious Costs on State and Local Governments.

1. State and local governments face particular risks from the construction of the Hobbs Act advanced by the court of appeals. In recent months, the Nation has witnessed high-profile conflicts between agencies whose orders are shielded by the Hobbs Act and state and local governments. For example, in the realm of internet regulation, the FCC has been "on a march to smother local authority by blocking states from regulating any aspect of broadband service, supporting states that have raised barriers to municipal networks, deregulating pricing for lines running between cities, and removing local control over rights-of-way that could be used to bring cheaper access into town." Susan Crawford, *Cities Are Teaming Up to Offer Broadband, and the FCC Is Mad*, Wired (Sept. 27, 2018), http://goo.gl/2v2jR3. And as 5G wireless phone technology has become available, "[d]espite efforts by local and state governments, including scores of commenters in the

agency's docket, the Commission has embarked on an unprecedented federal intrusion into local (and state) government property rights that will have substantial and continuing adverse impacts on cities and their taxpayers, including reduced funding for essential local government services, and needlessly introduce increased risk of right-of-way and other public safety hazards." Tom Cochran, *Statement by U.S. Conference of Mayors CEO & Executive Director Tom Cochran on FCC's Order Subordinating Local Property Rights*, U.S. Conference of Mayors (Sept. 26, 2018), http://goo.gl/XZKLkx.

The FCC regularly dictates to cities where and how telecommunications equipment may and may not be installed. In practice, this has meant allowing service providers to construct "hundreds of thousands of small [cell] stations * * * an average of a few hundred feet apart, on streetlights, utility poles and other structures." Tiffany Hsu, *F.C.C. Puts 5G Rollout Rules in Federal Hands*, N.Y. Times (Sept. 26, 2018), http://goo.gl/brt2UF. This project has sparked widespread chaos as localities struggle to manage their physical space and municipal resources in the shadow of top-down dictates.

And these are only the highest-profile cases: In countless other ways, large and small, the actions of the FCC and other agencies impose burdens on state and local governments. Given the sheer volume of agency regulatory output, it is effectively impossible for any state or local government to stay abreast of every coming directive.

If any locality chooses to challenge those burdens in court, the Hobbs Act is restrictive enough: locali-

ties that missed their initial chance to challenge the FCC's top-level directives during the 60-day window cannot seek judicial review—even if they had no idea what was coming. But the Fourth Circuit's decision goes further still. Under the lower court's ruling, the FCC's mandates even foreclose district courts from adjudicating the key statutes in disputes between *private parties*.

The FCC's authority to regulate municipal broadband and promote 5G deployment stems from the Telecommunications Act of 1934, 47 U.S.C. § 151 *et seq.* When state and municipal governments take action pursuant to the Act, private parties—whose property rights and quality of life are substantially impacted—may feel that the only means to protect their interests is to sue the very government that they elected to protect them from such overreach, arguing that those localities' actions go beyond either the requirements of the Act or the relevant directives of the FCC. For instance, if a landowner's property is obtained via eminent domain for the purposes of constructing new 5G transmission equipment, he might challenge that action by the city on the grounds that it exceeds the scope of the Act.

Such suits turn on questions of fact: Because states and municipalities are widely diverse, the nationwide rollout of the FCC's projects has not been a uniform process. The questions over whether a particular action is permitted or prohibited by the Telecommunications Act are context-specific. Unlike appellate courts, district courts have the expertise to conduct the necessary fact development and properly adjudicate state and local governments' claims when such disputes arise. But under the Fourth Circuit's

ruling, the FCC's interpretations must shape how all such litigation can unfold—even in cases where the FCC's own orders or rules are not at issue, and where the meaning of the Telecommunications Act is the *only* legal question at issue. Where the FCC has opined on any even loosely related issue, the Hobbs Act would potentially impair a government's ability to defend its conduct as compliant with the statute, because the complex network of FCC regulations and orders may be read as close enough to preclude the court's straightforward application of the statute.

In the face of burgeoning administrative creep, state and local governments need their day in federal court—now more than ever.

2. No doubt the agencies covered by the Hobbs Act would favor this circuitous "remedy." But harsh experience suggests that the opportunity to petition for a rulemaking or review of the underlying order, and *following denial*, seek relief in the appeals court, is not an adequate remedy at law. State and local governments simply have no tools to force the agency to take action and hand down an appealable judgment. And this leads to pernicious results.

In 2014 this Court denied certiorari in *Walburg* v. *Nack*, 572 U.S. 1028 (2014) (No. 13-486), a case presenting issues closely related to those present here. Evidence put forward during that process disclosed the uncomfortable reality that agencies are regularly keeping the door to judicial review tightly shut. *Amici* in that case sought declaratory rulings from the FCC in the hopes of obtaining final, appealable orders, to no avail. Indeed: the FCC denied that it had an obligation to issue such an order at all. See

Opp. of the Fed. Commc'ns Comm'n to Pet. for Writ of Mandamus at 15–16, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. May 24, 2012). See also Brief for Anda, Inc. as *Amicus Curiae* Supporting Petitioner, *Walburg* v. *Nack*, 572 U.S. 1028 (2014) (No. 13-486), 2013 WL 6072252 ("[I]n Anda's case, its petition has now been pending for three years—and [the FCC] has asserted that it has no duty to respond to such petitions.").

This was not an isolated event: In 2017, the Sixth Circuit heard a case in which local cable providers filed petitions urging the FCC to reconsider several rules it had promulgated. The Sixth Circuit observed that "[t]he FCC neglected to respond to those petitions for nearly seven years." *Montgomery Cty., Maryland* v. *FCC*, 863 F.3d 485, 488 (6th Cir. 2017).

If other agencies follow the FCC's approach, for all intents and purposes, the Hobbs Act will cut off *any* further review of agency orders once the initial 60-day window closes. States and localities will have no recourse whatsoever. Their only choice will be to monitor, comment on, and promptly appeal every order that may eventually be applied in a way that is harmful to them, regardless of how likely the harm is to occur. State and local governments lack the resources to support that excessive administrative involvement.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fourth Circuit.

Respectfully submitted.

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APPENDIX – INTEREST OF *AMICI*

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE U.S. CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber has 300,000 direct members and indirectly represents more than three million businesses of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing amicus briefs in cases involving issues of national concern to American business.

The Chamber and its members have two important interests in this case. ***First***, many of the Chamber's members are regulated by the federal administrative agencies whose final orders are reviewable under the Hobbs Act. These members rely on the regulatory certainty and national uniformity promoted by the system of orderly court of appeals review established by Congress in that law.

Second, businesses that are sued for purported violations of agency regulations—by the agency itself or by a private party acting as a private attorney general—have a strong interest, rooted in due process, in being able to defend themselves. This includes making arguments about the reach and authority of agency rules.

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1. No counsel for any party authored this brief in whole or in part, and no person or entity other than the Chamber, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief by express written consent.

This is particularly salient in vexatious litigation under the Telephone Consumer Protection Act ("TCPA"). The TCPA has turned into a breeding ground for lawsuits by serial plaintiffs and lawyers who have made lucrative businesses out of targeting legitimate activities by U.S. companies. Class actions seek to exploit the statutory damages of $500 to $1,500 per communication to seek millions and billions in damages. TCPA lawsuits are a cottage industry and a scourge on legitimate businesses—from small restaurants to the L.A. Lakers to sellers of generic drugs—who have little warning that reasonable communicative activities may generate crushing litigation. *See, e.g., Bais Yaakov v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017) (Kavanaugh, J.) ("Let that soak in for a minute: Anda was potentially on the hook for $150 million for failing to include opt-out notices on faxes that the recipients had given Anda permission to send."), *cert. denied*, 138 S. Ct. 1043 (2018)). The Chamber has taken an active role in defending businesses both at the Federal Communications Commission and in court. *See, e.g., ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Businesses should not be barred from defending themselves when an agency order is used in litigation to purportedly subject them to enormous damages.

SUMMARY OF THE ARGUMENT

Congress exercised its authority over the jurisdiction of the federal courts to foreclose challenges to the "validity" of final orders covered by the Hobbs Act, except through direct review in a court of appeals within a 60-day timeframe. This regime generally prevents repeated challenges to agency action and promotes regulatory certainty and uniformity on which regulated entities

substantially rely in ordering their operations. When agencies develop regulations after notice and comment and those regulations are either vindicated on judicial review or not challenged at all, the regulated community relies on them. Every day, American businesses make decisions that respond to and rely on agency determinations about their legal rights and obligations. Those expectations are protected by a robust application of the Hobbs Act that channels judicial review and limits collateral attacks.

Equally important, due process requires that private defendants in litigation to enforce agency rules be able to challenge the reach and basis of those rules. When agency rules are to be enforced against a party by the government, the defendant must be able to mount a defense that includes challenging the basis for the rule being applied to it. The same logic protects defendants when rules are being enforced by private actors, such as in class actions or private attorney general suits. This is particularly the case under the TCPA, where private defendants are subjected to unpredictable liability based upon alleged violations that stray far from congressional goals and reasonable regulatory implementation. *See* U.S. Chamber, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

ARGUMENT

I. THE COURT SHOULD PROTECT THE NATIONAL UNIFORMITY AND RELIANCE INTERESTS PROMOTED BY THE HOBBS ACT.

A. The Hobbs Act Channels Review Of Covered Agency Orders To A Single Court of Appeals Within A Specified Timeframe.

Direct review of final orders of seven regulatory agencies—the Federal Communications Commission, Department of Agriculture, Department of Transportation, Federal Maritime Commission, Nuclear Regulatory Commission,[2] Surface Transportation Board, and Department of Housing and Urban Development—is governed by the Administrative Orders Review Act, 64 Stat. 1129 (1950), codified at 28 U.S.C. §§ 2341–2352, commonly known as the Hobbs Act.

The form of judicial review specified by the Hobbs Act has several distinctive features. *First*, the Hobbs Act vests "exclusive jurisdiction" in the federal "court of appeals . . . to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders" covered by the Act. 28 U.S.C. § 2342. This "basic congressional choice" obligates a court of appeals to determine "whether the action passes muster under the appropriate

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2. Actually, the Hobbs Act specifies the Atomic Energy Commission. 28 U.S.C. § 2342(4). The relevant functions of that agency were transferred to the Nuclear Regulatory Commission, and review is now taken from the NRC. *See* 42 U.S.C. § 5841; *Reytblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997).

[Administrative Procedure Act] standard of review." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 741, 744 (1985).

Second, the Hobbs Act establishes venue "in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." 28 U.S.C. §§ 2343, 2344. This provision, operating in conjunction with the judicial lottery and first-to-file rule established by 28 U.S.C. § 2112, ensures judicial review is consolidated in a single court of appeals when multiple petitions for review are filed. *See, e.g., Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 289 (7th Cir. 2018) (explaining interaction of the Hobbs Act with 28 U.S.C. § 2112).

Third, the Hobbs Act requires petitions for review to be filed "within 60 days" of the order's entry. 28 U.S.C. § 2344. The lower courts "have uniformly held that the Hobbs Act's 60-day time limit . . . is jurisdictional." *Henderson v. Shinseki*, 562 U.S. 428, 437 (2011); *cf. Stone v. INS*, 514 U.S. 386, 405 (1995). This jurisdictional constraint limits the timing of petitions seeking direct review and generally prevents collateral attacks on previously promulgated orders. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463 (1984). Litigants have options, even after the Hobbs Act period, in which to bring substantive challenges to agency rules.[3]

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3. After the Hobbs Act period expires, persons aggrieved by agency rules may "fil[e] a petition for amendment or rescission of the agency's regulations, and challeng[e] the denial of that petition" in the court of appeals. *See Edison Elec. Institute v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992) (citation omitted). If collateral litigation is pending, the district court has discretion to hold its proceedings

B. The Hobbs Act Promotes National Uniformity And Predictability, Which Fosters Substantial Reliance By Regulated Communities.

The "far-reaching procedural effects" of the Hobbs Act serve several important purposes. *See Simmons v. ICC*, 716 F.2d 40, 44 (1983) (Scalia, J.).

First, and of great importance to the business community, the Hobbs Act protects important reliance interests that are vital to the national economy. Businesses participate in agency regulatory proceedings in hopes of influencing rules and orders. They often participate in judicial review of agency orders to protect their interests and present arguments. Once rules are final, businesses build their operations, policies, and products around federal regulatory expectations, often over many years. Companies create compliance plans, hire personnel, and form contractual relationships. Reliance interests protected by the Hobbs Act can range from the build out and operation of national telecommunications networks, to the establishment of international maritime agreements, to compliance plans for Railroad Retirement Board obligations applicable to rail carriers.

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in abeyance pending the agency's resolution of a relevant petition. *See, e.g.*, *Raitport v. Harbour Capital Corp.*, 312 F. Supp. 3d 225, 227 (D.N.H. 2018) (holding proceeding in abeyance pending outcome of *Bais Yaakov*, 852 F.3d at 1078). District courts also can proactively facilitate agency engagement and revision of rules through primary-jurisdiction referrals. *See Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68–69 (1970).

A few examples illustrate the investment built on regulatory determinations. When the FCC by rule exempted next-generation fiber facilities from its network unbundling and sharing requirements applicable to legacy telephone equipment, the telecommunications industry responded with millions of dollars in new investment supporting fiber deployments that vastly increased the number of households with broadband internet connections. *See In re Bus. Data Servs. in an Internet Protocol Env't*, 32 FCC Rcd. 3459 ¶ 5 n.15 (2017). Similarly, railroads, shippers, and other participants in the surface transportation marketplace indicate that their capital investment decisions reflect substantial reliance and investment-backed expectations with regard to rates and other regulations adopted by the Surface Transportation Board. *See, e.g.*, Comments of CSX Trans., Inc., *In re Competition in the Railroad Industry*, STB Ex Parte No. 705 (filed Apr. 12, 2011).

Manufacturers of communications equipment and other regulated devices design their products in reliance on FCC rules about certifications and conformity with disability access and other requirements. *See* FCC, *Equipment Authorization* (last visited Jan. 15, 2019), https://www.fcc.gov/engineering-technology/laboratory-division/general/equipment-authorization. Likewise, telecommunications carriers and investors base strategies, corporate structures, and long-term investment decisions on regulations applicable to non-U.S. ownership, spectrum use, and build out requirements, *see, e.g.*, 47 C.F.R. § 63.11, which are often in place for years because these substantial investments must have a long time-horizon. Disruption of agency rules by district courts in collateral litigation long after they are final would be markedly

unfair to defendants and substantially harm the reliance interests of regulated communities.

The channeling features of the Hobbs Act ensure that regulatory changes will normally occur only after consideration by the agency and review by a court of appeals. This orderly process helps to ensure that the aforementioned "serious reliance interests" are "taken into account" when an agency changes position. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Respect for reliance interests also prevents the "unfair surprise" that can result when an interpretive change during district court litigation results in "potentially massive liability . . . for conduct that occurred well before that interpretation was announced." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–56 (2012). Where rules promulgated by Hobbs Act agencies are subject to enforcement through private rights of action, for example, potential defendants must be able to rely on agency orders to show that their conduct was lawful. *See, e.g., CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010) (affirming summary judgment where regulatory exemption provided "a complete defense" to enforcement); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 445 (6th Cir. 2013) (affirming dismissal under similar circumstances). Otherwise, defendants could be found liable where an agency "did not think the industry's practice was unlawful" and its regulations reflected that position. *Christopher*, 567 U.S. at 158.

Second, the Hobbs Act promotes national uniformity. It "allows 'uniform, nationwide interpretation of the

federal statute by the centralized expert agency'" followed by consolidated court of appeals review. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1119 (11th Cir. 2014) (quoting *CE Design*, 606 F.3d at 450). This scheme prevents divisions of authority that increase compliance costs and may take years to resolve, *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–83 (2005), while simultaneously constraining agency authority by guaranteeing "one review of right in an appellate court" of final agency orders, *see Providing for the Review of Orders of Certain Agencies: Hearing Before the H. Subcomm. No. 2*, 81st Cong. 65 at 112 (1949) (statement of the Hon. Orie L. Phillips, Chief Judge of the 10th Circuit Court of Appeals).

Concerns about national uniformity are acute in industries with nationwide reach. Congress designated for Hobbs Act review the final orders of agencies which regulate important national interests. The Federal Communications Commission, Department of Transportation, Federal Maritime Commission, Surface Transportation Board, and Department of Agriculture regulate the channels and instrumentalities of interstate commerce, as well as goods intended for nationwide distribution. *See, e.g., United States v. Dunifer*, 219 F.3d 1004, 1008 (9th Cir. 2000) (explaining need for "uniform, nationwide interpretation of the federal statute . . . governing the nation's airwaves") (quotation marks and citation omitted). The Nuclear Regulatory Commission and Department of Housing and Urban Development similarly implement policies of national concern.[4] The

4. At first glance, HUD seems like something of an outlier in this list. But the covered orders of that agency are those issued

Court has long recognized the need for consistent agency oversight in such areas. *See Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970); *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952).

Finally, the Hobbs Act promotes judicial efficiency. It helps "avoid the waste" of judicial resources that occurs where a district court and court of appeals each "decide, on the basis of the record the agency provides, whether the action passes muster under the appropriate APA standard of review." *Fla. Power & Light Co.*, 470 U.S. at 741, 744. By channeling review to the court of appeals, the Act also ensures "that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *See Port of Bos.*, 400 U.S. at 70. These mutually reinforcing interests are key benefits of the Hobbs Act, which this Court should protect.

II. THE COURT SHOULD ALSO PROTECT PRIVATE DEFENDANTS' DUE PROCESS RIGHT TO CHALLENGE REGULATIONS ENFORCED AGAINST THEM, PARTICULARLY IN TCPA CASES.

While the stability, certainty, uniformity, and efficiency benefits of the Hobbs Act are vital, they cannot outweigh private defendants' due process rights. In

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under section 812 of the Fair Housing Act, which are orders that resolve charges of discriminatory housing practices after both parties have elected to forego federal district court proceedings. *See* 28 U.S.C. § 2342(6); 42 U.S.C. § 3612. Congress may have been sensitive to costs or delays associated with requiring such individuals to relitigate a dispute in district court.

cases to enforce agency regulations, particularly TCPA class action lawsuits manufactured by the plaintiffs' bar, private defendants must be able to challenge the legality and reach of the rules.

Of course, a district court may always determine how an agency rule—accepted as valid—applies to the facts. The court below correctly recognized that even accepting a rule as valid, "the court can, and must, interpret what [the rule] says" and how it applies. App. 11a; *accord CE Design*, 606 F.3d at 450–51.

Beyond contesting how a rule applies, private defendants facing enforcement of an agency rule in litigation possess a due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quotation marks omitted). In the context of administrative obligations, this due process right generally requires that defendants be able to make arguments about the reach and authority of agency rules enforced against them, particularly where a defendant lacked a meaningful opportunity to participate in the agency rulemaking proceeding. Otherwise, "one can conceive of a whole parade of horribles headed by a circumstance in which a party totally deprived of due process in an original agency petition could never obtain review of the merits." *Fritsch v. ICC*, 59 F.3d 248, 252 (D.C. Cir. 1995); *accord Ex parte Young*, 209 U.S. 123, 147 (1908) ("If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional."). A defendant against whom litigation is brought may not have existed at the time a regulation was promulgated, may not have been in the relevant line of business at the time, or may not

have thought that a rule would be construed in a particular way with regard to its operations.

The due process right to present every available defense is at full force when the government seeks to enforce an administrative order covered by the Hobbs Act. Where a defendant contends that application of an agency rule will violate his constitutional rights, for example, the court may address that issue. The Court's decision in *FCC v. Fox Television Inc.*, 567 U.S. 239 (2012), is illustrative. There, two broadcasters, Fox and ABC, sought review of enforcement orders issued in 2006 holding that certain of their 2003 broadcasts violated the FCC's indecency standards. The standards had been in place since 2001, but the agency had refined their meaning in 2004 and applied the new meaning retroactively. The Court set the enforcement orders aside because the underlying standards were unconstitutionally vague "as applied." *See id.* at 258. "[T]he Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that [the broadcast content] could be actionably indecent." *Id.* at 254. Principles of constitutional avoidance reinforced the conclusion.[5]

The due process right to present every available defense means that a defendant may also challenge government enforcement as ultra vires. "[W]hen an agency seeks to apply the rule, those affected may challenge that application on the grounds that it 'conflicts with the statute

5. The indecency standards in *Fox Television* implicated speech, mandating "rigorous adherence" to due process requirements "to ensure that ambiguity does not chill protected speech." 567 U.S. at 253–54. But the Court made clear that the due process rationale would apply "with respect to a regulatory change this abrupt on any subject." *See id.* at 254.

from which its authority derives.'" *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (collecting cases); *see generally Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958). When the government sues for violation of a statute, it necessarily puts its administrative interpretation of the statute at issue.

Due process rights are similarly at play where Congress authorizes private enforcement of agency regulations in district court. In this circumstance, persons asserting a private right of action step into the shoes of the government. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). The due process considerations that permit a defendant in a government enforcement action to challenge the constitutional implications and statutory authorization for a rule are equally strong when a private party brings the enforcement action.

Such due process principles apply with special force in litigation under the TCPA because the statute's draconian damages provisions and private right of action can be used to impose extreme and unpredictable penalties that bear little if any relationship to any actual harm caused to the plaintiff. TCPA plaintiffs increasingly have been availing themselves of regulatory uncertainty and confusion in the courts about this decades-old statute. Originally enacted by Congress to bar certain types of invasive telemarketing, plaintiffs have used it to foist upon unsuspecting U.S. businesses "staggering, and potentially annihilating, amounts of statutory damages tied to new technologies." U.S. Chamber, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 1 (Aug. 2017), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf (detailing filed cases, expansive theories, and course of unfair

litigation). Plaintiffs in these class action lawsuits use the FCC's rules and gaps in interpretations to sue legitimate businesses for the use of new technology or for innocent missteps in marketing campaigns.[6]

Defendants may face limited options in defending themselves. TCPA litigation often involves questions of what Congress meant to proscribe, and how the FCC has implemented the statute. Defendant businesses and their associations have sought clarifications and relief from the FCC, to little avail so far, and regularly seek judicial review of agency action when available and needed. *See ACA Int'l*, 885 F.3d at 687. TCPA defendants should be able to contest the validity of imprecise or outdated obligations that plaintiffs seek to apply to them.

Beyond the unpredictability and unfairness of weaponizing the TCPA against unwitting businesses, that statute raises serious constitutional questions. TCPA liability is imposed on communicative activities, so it implicates core First Amendment interests. Indeed, several courts have found the TCPA to be a regulation of speech subject to strict scrutiny. *See, e.g., Holt v. Facebook*, No. 16-cv-02266, 2017 WL 1100564 (N.D. Cal.

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6. Examples of meritless TCPA suits abound. A group of fans sued the Los Angeles Lakers for sending text messages confirming receipt of fan-originated texts. *See Emanuel v. Los Angeles Lakers, Inc.*, No. 12-cv-9936, 2013 WL 1719035 (C.D. Cal. Apr. 18, 2013). A ride-sharing service was sued for texts confirming receipt of ride requests. *See Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014). A seller of generic drugs was sued for failing to include opt-out notices on faxes that the recipients had given the company permission to send. *See Bais Yaakov*, 852 F.3d at 1078.

Mar. 19, 2017). Due process concerns are pronounced when such First Amendment interests are at stake, making it especially important to permit defendants to challenge the rules sought to be enforced against them. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 486 (1984). Plaintiffs lack a similar interest because they are not the subject of an enforcement action predicated on a regulation.

CONCLUSION

The Court should ensure that its disposition of this case does not undermine the regulatory certainty and national uniformity promoted by the Hobbs Act, while also protecting private businesses' due process rights to defend against unwarranted liability inflicted by the FCC's prior interpretations of the TCPA.

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